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Estoppel in Property Law

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Stewart E. Sterk*

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I. INTRODUCTION

Since Samuel Williston and his advisors introduced Section 90 into the first Restatement of Contracts, the role of estoppel—particularly promissory estoppel—has generated continuing controversy among

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courts and contracts scholars.¹ Doctrinally, promissory estoppel serves two functions in contract law. First, promissory estoppel serves as a substitute for contract law's familiar requirement of "consideration."² Second, estoppel permits enforcement of contracts that do not satisfy the statute of frauds.³

In addition, estoppel plays an important role in property law. Because consideration is unnecessary to support transfers of real property, estoppel's principal role in property law is as a doctrinal alternative to the writing generally necessary for real property conveyances. Estoppel is important not only as a basis for upholding transfers of fee interests, but also as a foundation for creating (and terminating) servitude interests, for resolving boundary disputes, and for protecting leasehold interests against forfeiture. Indeed, estoppel's important role in property law long predates the rise of promissory estoppel as a basis for contract liability.

Much of the debate over promissory estoppel in current contract scholarship focuses on whether promissory estoppel liability is reliance-based or promise-based. That is, do courts enforce promises because they induce reliance, or is reliance important only as evidence that the promisor has communicated—by words or actions—an intent to be bound?⁴ That question—critical in contract scholarship—is also

1. For a recent discussion of the evolution of the promissory estoppel doctrine, see Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 WILLAMETTE L. REV. 263 (1996).
2. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1982). Section 90 is included in Chapter 4 of the Restatement (Second) of Contracts, which is entitled "Formation of Contracts—Consideration." Topic 2, which includes section 90, is entitled "Contracts Without Consideration."
3. See RESTATEMENT (SECOND) OF CONTRACTS § 139 (1981). Section 139 is included in Chapter 5 of the Restatement, which is entitled "The Statute of Frauds." Topic 7, which includes section 139, is entitled "Consequences of Non-Compliance." Comment (a) to section 139 indicates that the section is "complementary to § 90." RESTATEMENT (SECOND) OF CONTRACTS § 139 cmt. a (1981).
4. Edward Yorio and Steve Thel have argued that promise, not reliance, is the foundation for the promissory estoppel doctrine. They argued that the prospect of definite and substantial reliance screens for seriously considered promises, but that it is the serious consideration the promisor gives to the promise, not the promisee's reliance interest, that is critical in promissory estoppel cases. See Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111, 113 (1991). Daniel Farber & John Matheson had earlier argued that reliance was no longer critical in promissory estoppel cases; they concluded that, without regard to reliance, "any promise made in furtherance of an economic activity is enforceable." Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903, 904-5 (1985); see also Randy E. Barnett, *The Death of Reliance*, 46 J. LEGAL EDUC. 518 (1996); James Gordley, *Enforcing Promises*, 83 CAL. L. REV. 547, 568-70 (1995); W. David Slawson, *The Role of Reliance in Contract Damages*, 76 CORNELL L. REV. 197, 216-28 (1990) (arguing that reliance-based recovery is normatively wrong).

important in property law. In several respects, however, estoppel doctrine is more complex in property law than in contract law. First, in property law the doctrine of estoppel frequently operates against a party who has made no express promise at all. That is, a party may be estopped by a course of conduct that involves no verbal representations; indeed, on rare occasions, silence alone may give rise to an estoppel.⁵ Second, in property law the doctrine raises a question addressed with far less frequency in contract law: to what extent are successors-in-interest estopped by the actions of their predecessors? Suppose, for instance, a landlord's oral representations induce reliance in a tenant, or one neighbor's representations induce reliance in another. Neither the representation alone, the reliance alone, nor the two in combination, explain why a successor-in-interest to the original promisor should be estopped by the actions of a predecessor. Because obligations in property law frequently "run with the land" (or with an estate in land), courts must, with some frequency, reconcile the interests of the disappointed promisee with those of a subsequent purchaser who did not, herself, make the promise.

In this Article, I examine the use of estoppel principles in property law cases. My enterprise is descriptive, not normative. I have examined the use of the estoppel doctrine in several doctrinal areas: land transfers, creation of servitudes, termination of servitudes, boundary disputes, and landlord-tenant law. In so doing, I have focused on cases decided since 1960.

An examination of case law in those areas suggests that estoppel doctrine performs several functions in property law. First, courts often invoke the estoppel doctrine to enforce promises or representa-

Until the last fifteen years, by contrast, the conventional wisdom was that reliance was the critical element in the promissory estoppel doctrine. That wisdom became conventional with publication of the landmark two part article, L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages* (pts. 1 & 2), 46 YALE L.J. 52, 573 (1936-37). See also Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 32 (1979). More recent commentary has also argued that reliance is essential to promissory estoppel claims, at least in commercial contexts. See Sidney W. DeLong, *The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 As Catch 22*, 1997 WIS. L. REV. 943; Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580 (1998).

5. One might subsume these cases under the rubric of contract law if one adopted a theory of contract law that did not require a "meeting of the minds"—subjective assent, by both parties, to be bound. Randy Barnett, for instance, argues that contract law requires only a manifestation of consent to be bound by acts, or even silence, in the face of reliance. See Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 312-15 (1986). Jean Braucher has argued, however, that Barnett's consent theory is so broad that it could turn even negligence liability into a form of breach of contract. See Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 703-06 (1990).

tions. In these cases, reliance is important because it provides evidence of a promise, not because courts are independently concerned about reliance divorced from promise. When reliance provides strong corroboration of promise, courts enforce promises rather than limiting promisees to recovery of expenditures made in reliance on the promise. On the other hand, courts sometimes invoke estoppel in tort-like settings, holding, in effect, that the relationship between the parties, or the non-verbal acts of one of the parties, creates a duty to rescue a neighbor or a tenant from dire financial consequences.⁶ This use of estoppel doctrine—to protect the interests of parties who rely on the non-verbal acts of another—is more controversial than use of estoppel doctrine to enforce express promises, but nevertheless represents a significant subcategory of estoppel cases.

Case law also suggests that successors-in-interest can be estopped by the actions of their predecessors—but only where the successor-in-interest had adequate opportunity to learn of the actions which gave rise to the estoppel.

II. LAND TRANSFERS

A landowner seeking to transfer an interest in land typically executes a deed and delivers it to a transferee. Unless the transfer is gratuitous, it will generally be preceded by a contract, executed by both buyer and seller, obligating seller to sell, and buyer to purchase, at the price stipulated in the contract. If the deed adequately describes the property and is properly executed by the transferor, no statute of frauds problem is likely to arise. Even if no deed has been executed, neither party may invoke the statute of frauds as a defense if a properly executed contract of sale includes all of the material terms of the agreement.⁷ If a purchaser refuses to perform, the seller may obtain judgment for the purchase price; if the seller balks, the purchaser may obtain specific performance.

Estoppel doctrine becomes important if neither contract nor deed complies with the statute of frauds. Suppose, for instance, a writing memorializes a purported transfer, but the writing omits a material

6. Grant Gilmore labeled promissory estoppel as "quasi-tort" liability. See GRANT GILMORE, *THE DEATH OF CONTRACT* 89 (1974). Others have also noted that protection of reliance, as contrasted with enforcement of promise, has a tort-like character. See Farber & Matheson, *supra* note 4, at 945.

For a discussion of the duties common law courts impose on neighboring landowners, see Stewart E. Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55 (1987).

7. The Restatement (Second) of Contracts, section 131, enumerates the requirements for a writing to satisfy the statute of frauds while section 125 subjects a contract for the transfer of land to the statute's requirements. See RESTATEMENT (SECOND) OF CONTRACTS § 131 (1980); RESTATEMENT (SECOND) OF CONTRACTS § 125 (1977).

term, or the transferor's signature. If one party takes actions that make sense only on the assumption that the parties have made a deal, and if the other party, upon learning of those steps, takes no action to set the record straight, estoppel may prevent the recalcitrant party from invoking the supposed defect to avoid enforcement of the disputed deal.⁸ Similarly, estoppel principles may operate to bind the parties even if there has been no writing at all.

A. Inadequate Writings

When one party to a land transfer transaction invokes estoppel to overcome a defective writing, the principal question confronting the court is whether the writing and the conduct of the parties, taken together, establish an intent to be bound, or whether the parties had merely engaged in negotiations which had not yet culminated in a "deal." In general, if the written document is defective because it was not executed by the necessary parties, courts are more likely to treat the document as preliminary, and to insist on a great deal of reliance before validating the transfer. A written agreement does not provide strong evidence of an intent to be bound if one of the parties has not yet signed the agreement; indeed, failure to sign provides some evidence of an intent not to be bound. Hence, courts are reluctant to enforce unexecuted agreements absent exceptionally strong corroborating evidence of promise.

By contrast, if the document has been properly executed, but is missing a material term (such as a description of the property) courts are more likely to conclude that the parties had formed an intent to be bound. The very act of signing indicates an intent to be bound to something; the question is only the content of the agreement, not its existence. In this situation, courts are more willing to use the conduct of the parties to flesh out the missing term.

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8. RESTATEMENT (SECOND) OF CONTRACTS, section 129, entitled "Action in Reliance; Specific Performance," provides:

A contract for the transfer of an interest in land may be specifically enforced notwithstanding failure to comply with the Statute of Frauds if it is established that the party seeking enforcement, in reasonable reliance on the contract and on the continuing assent of the party against whom enforcement is sought, has so changed his position that injustice can be avoided only by specific enforcement.

RESTATEMENT (SECOND) OF CONTRACTS § 129 (1981). Thus, the black letter starts by assuming a contract and providing that the contract is enforceable without a writing if there has been reasonable reliance which would create injustice if specific enforcement were not awarded. Comment (b), however, makes it clear that conduct which would make no sense in the absence of an agreement can be used to prove the existence of the agreement. The drafters provided that "the extent to which the evidentiary function of the statutory formalities is fulfilled by the conduct of the parties" is an element in determining whether the section is applicable. RESTATEMENT (SECOND) OF CONTRACTS § 129 cmt. b (1981).

*Hoffman v. S. V. Company*⁹ illustrates the reluctance with which courts invoke estoppel principles to bind parties to the terms of unexecuted land sale contracts.¹⁰ In *Hoffman*, negotiations between seller and purchasers led to a telephone conversation during which the parties reached an understanding that the purchasers would pay \$90,000 for the property. The following day, January 22, purchasers sent seller a letter memorializing the conversation, and restating the agreement as "\$90,000 payable at 30% down," with the remainder to be "paid pursuant to a five year installment note at 9 3/4% interest."¹¹ The letter also indicated that seller agreed to subordinate its note to a construction loan and that the city's approval of a subdivision was a condition precedent to the agreement. Purchasers sent a \$5,000 check, which seller deposited in a trust account. Purchasers spent \$436 for survey work necessary for the subdivision, and then sought and obtained subdivision approval.

Seller then prepared a sale agreement and delivered the agreement, unsigned, to purchasers. Before purchasers signed the agreement, seller began negotiating with another purchaser. On March 23, two days after purchasers obtained subdivision approval, seller's agent urged purchasers to complete the deal as quickly as possible. On April 8, however, seller sold all of its assets, including the land at

9. 628 P.2d 218 (Idaho 1981).

10. Other cases illustrate the same principle. For instance, in *Sayer v. Bowley*, 243 Neb. 801, 503 N.W.2d 166 (1993), the sellers and buyers had conducted discussions about a purchase of the disputed land. The seller asked his lawyer to memorialize the terms of the discussions, but the written "agreement" was modified several times, and never executed. The purchasers paid the sellers \$25,000 in "earnest money," made arrangements to farm the land, and apparently planted crops. *See id.* at 803, 503 N.W.2d at 168. When the sellers refused to convey, the purchasers sought specific performance of the alleged oral contract the parties had reached, or at least damages for loss of the benefit of their bargain. *See id.*

Although the trial court awarded return of the purchasers' earnest money, together with a statutory lien to reimburse them for monies spent increasing the value of the land, the court held that the purchasers were not entitled to specific performance or to the benefit of their bargain. The Nebraska Supreme Court affirmed, emphasizing that after the original unsigned "contract," four more drafts were prepared—none of them signed. *See id.* "Suffice it to say," wrote the court, "that the conduct of the parties during the drafting of these documents indicates that several important terms had not been discussed or agreed upon at the time of the alleged oral agreement." *Id.*

Similarly, in *Bennett v. Horton*, 592 S.W.2d 460 (Ky. 1979), the Kentucky Supreme Court held that seller was not estopped to invoke the statute of frauds when the seller's lawyer had prepared, but the seller had not signed, a sale contract. There, the purchasers moved on to the property, gave the seller items of personal property which the seller treated as rent, and made \$15,000 in improvements to the property. Several years after the purchaser first took possession, the seller sought to increase the rent. When the purchaser refused to pay, the seller sought possession, and the purchaser (unsuccessfully) invoked the unsigned agreement—and estoppel principles—as a defense. *See id.* at 463-64.

11. *Hoffman v. S.V. Co.*, 628 P.2d at 220.

issue, and returned purchasers' deposit. Only then did purchasers sign the agreement seller had delivered more than two weeks earlier. When purchasers sought specific performance of the oral contract to transfer land, the trial court held the oral agreement unenforceable for failure to comply with the statute of frauds.¹²

The Idaho Supreme Court affirmed, rejecting purchasers' argument that the doctrines of part performance and equitable estoppel required enforcement of the oral agreement. As the court recognized, the doctrine of part performance—a close relative to estoppel¹³—permits enforcement of an oral agreement when the purchaser has made substantial improvements in reliance on an oral contract for the sale of land. The court, however, concluded that the \$436 cost of obtaining subdivision approval was not substantial in relation to the value of the property.¹⁴

Although the court concluded that the record included substantial evidence to support the trial court's finding that the parties had reached a mutual, albeit oral, understanding as to the terms of the sale transaction, a court might naturally wonder, in a case like *Hoffman*, why neither of the parties executed the sale contract. If the agreement was a done deal, one would have expected purchasers, at least when urged by seller's agents to complete the deal as soon as possible, to execute the sale contract with dispatch. Their failure to do so undoubtedly cast some suspicion on their contention that the deal had been finalized.¹⁵

In contrast, when the defect in the writing relates to indefiniteness of the terms, rather than failure to execute, courts are more likely to

12. The purchasers had argued that the \$5,000 deposit check, deposited by the sellers, when considered together with the letter confirming the telephone conversation and the unsigned contract, should have been enough to satisfy the statute of frauds. The court disagreed, concluding that neither the check nor the letter included all of the material terms of the contract, and holding that the contract could not be considered in conjunction with the check or the letter because neither of those documents made explicit reference to the contract. *See id.*

13. Indeed, comment (a) to section 129 of the Restatement (Second) of Contracts, which deals with enforcement of oral contracts when a party has changed his position in reliance on the contract, represents that the provision "restates what is widely known as the 'part performance doctrine.'" *RESTATEMENT (SECOND) OF CONTRACTS* § 129 cmt. a (1981); *see also* L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages* (pt. 2), 46 *YALE L.J.* 373, 392 (1937) (noting that doctrine of part performance is "closely allied" to the estoppel doctrine).

14. Moreover, the court did not even suggest that the purchaser would be entitled to recover the \$436. *See Hoffman v. S.V. Co.*, 628 P.2d 218, 223 (Idaho 1981).

15. *See Walker v. Ireton*, 559 P.2d 340, 346 (Kan. 1977) (finding estoppel claim where "[t]he worst which can be said is that Ireton repeatedly promised that he would perform the oral contract and that he would . . . enter into a written contract to evidence the same. It was stipulated that the parties understood a written contract was to be prepared.").

enforce the agreement even if the party seeking enforcement has not proven substantial changes in his own position. Consider *Brooks v. Hackney*.¹⁶ There, sellers agreed to sell 25 acres of their 113-acre tract. Purchaser, in his own handwriting, drew up a sale contract which described the property in a way that would have included an infinite number of northern boundaries.¹⁷ The agreement provided that purchaser would pay \$6,000 down, and \$400 per month, beginning on a certain date at an interest rate of 12%. The interest rate was later decreased to 11%, but purchaser made the monthly payments for eight years and four months. At that point, the parties could not reach an agreement about purchase of the remainder of the sellers' tract. As a result, the purchaser stopped making payments and sought return of payments already made, alleging that the sale contract was unenforceable for indefiniteness.

The North Carolina Supreme Court held that the trial court had properly awarded summary judgment to sellers. In holding purchaser estopped from challenging the contract's validity, the court acknowledged uncertainty about whether purchaser had actually made significant use of the land, but noted that by making regular payments, purchaser had effectively reserved use of the land, and had led sellers to believe "that they were precluded from selling or renting the property to someone else."¹⁸ The sellers had not, however, pointed to any concrete loss they would have suffered if the court had permitted purchaser to invoke the statute of frauds, nor did sellers demonstrate how purchaser's actions had cleared up the indefiniteness of boundaries; in fact, sellers stipulated, by affidavit, that purchaser could draw any northern boundary he wished, so long as that boundary would enclose a total of 25 acres.¹⁹ In short, sellers did not demonstrate how enforcement of the contract was necessary to prevent any injustice to them.²⁰ Nevertheless, the court enforced the contract because the "reliance" provided good evidence that the parties had intended to bind themselves to an enforceable contract.²¹

16. 404 S.E.2d 854 (N.C. 1991).

17. The agreement provided that the boundary would be a line drawn from "Whitehead line" to the "road that goes by Plainfield Church" in a way that would "include 25 acres in all." *Id.* at 858. From any point on the Whitehead line, the boundary could have been drawn to a corresponding point on the specified road. Without knowing where on Whitehead line the boundary should start, it would be impossible to determine precisely what land had been conveyed.

18. *Id.* at 859.

19. *See id.* at 857.

20. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 129 (1981)(providing that a "contract for the transfer of an interest in land may be specifically enforced" despite a failure to comply with statute of frauds if "injustice can be avoided only by specific enforcement.").

21. *See* Yorio & Thel, *supra* note 4, at 159 (arguing that reliance increases the likelihood that the parties actually made a promise).

The result in *Brooks v. Hackney* is typical: when the parties have executed what appears to be a final land sale contract, albeit one which leaves a term indefinite, courts are quick to invoke estoppel against a party seeking to renege, even if the party seeking to enforce can show very little in the way of actual reliance.²² That is, when even meager reliance generates confidence that one party has made a promise, courts typically enforce the promise, rather than limiting the promisee to perhaps non-existent reliance damages.

B. Oral "Agreements"

Even when the parties have generated no writings at all, courts have been willing, on occasion, to estop landowners from denying an oral promise to transfer real property. Courts generally assume that a reasonable person would not make expenditures on land owned by a stranger in reliance on the stranger's oral promise to convey the land.

22. For example, in *O'Sullivan v. Bergenty*, 573 A.2d 729 (Conn. 1990), a landlord contracted to sell property to a tenant. The sale contract included the price, payment terms, an interest rate, and a puzzling statement that "A.P.R. may vary at option of Buyer." *Id.* at 730. The closing was to take place 13 months later, to accommodate the seller's tax needs. After the sale contract was executed, the purchaser continued to pay rent on the premises (as the contract provided), made a roof repair and a change in the door opening to the garage. In addition, the purchaser subleased a portion of the premises. When the purchaser sought specific performance, the seller contended that the agreement's APR term was too indefinite to permit enforcement. The trial court agreed, but held the agreement enforceable nevertheless, invoking the estoppel doctrine. The Connecticut Supreme Court affirmed, holding that the continued payment of rent, together with the roof repair and the garage door change, were sufficient to establish the reliance necessary to invoke the estoppel doctrine. *See id.* at 732-33. Note, however, that even if there had been no sale contract, the purchaser would have been obligated, as a tenant, to pay monthly rent. Moreover, the court did not indicate how much the purchaser had paid for the roof repair and the garage door change. Hence, it appears clear that the court enforced the agreement because it believed the parties had a deal, not to avoid an injustice generated by detrimental reliance.

Even when the written document does not appear to be a final sale contract or deed, the writing itself can be sufficient to support an estoppel or part performance claim. *See Sutton v. Warner*, 15 Cal. Rptr. 2d 632 (Ct. App. 1993) (finding an estoppel claim accompanied by written receipt for money received, together with a representation that purchaser would have first option to purchase property upon death of seller; purchaser made significant improvements on property).

In contrast, in *Gagne v. Stevens*, 696 A.2d 411 (Me. 1997), a seller and a purchaser entered into a contract to sell "a piece of lot # 58 . . . in the approximate size of 30± . . . located at the boundaries of the Foster Point Rd and Rt. 27." *Id.* at 413. When the seller refused to perform, the Maine Supreme Court held that the property description made the agreement too indefinite to enforce as a contract, and declined to address the purchaser's equitable estoppel claim, noting that the purchaser had argued only promissory estoppel, not equitable estoppel. The court also emphasized that the purchaser had generated no material issue of fact about any irretrievable change in position he might have made. *See id.* at 416.

Hence, courts are typically unwilling to enforce oral agreements for the transfer of land, even if the supposed transferee has made improvements on the land.²³

The situation is somewhat different when family members are involved. Social norms may lead a family member/promisee to forego a writing even though the same promisee would never forego a writing when entering into a land sale transaction with a stranger.²⁴

Suppose, for instance, a daughter alleges that her mother promised her that if she were to improve a parcel of land, the mother would convey the parcel to her. The daughter makes improvements, and, after a falling out with her mother, seeks to enforce the promise. Note first that the promise is plausible; within the family, parents and children do not typically reduce all of their agreements to writing, and a daughter might well make repairs or improvements in reliance on her mother's oral promise. At the same time, however, because children often act to benefit their parents without expectation of immediate reward, the act of improving or repairing does not establish beyond question that the acts were performed in reliance on the mother's promise. How, then, do courts respond to estoppel claims based on alleged oral promises by family members?

Where the supposed promisee can prove not only expenditures made on the property, but also a contemporaneous transfer of money or other legal rights to the family member who is the property's record

23. As we have seen, courts are even unwilling to enforce agreements accompanied by a written memorandum when the memorandum has not been signed by the parties. Here, the legal norm mirrors the social norm: land transfers are serious business which require formal writings. This is especially true when the parties are not relatives or friends. See, e.g., *Walker v. Ireton*, 559 P.2d 340, 346 (Kan. 1977)(rejecting estoppel claim, noting that "[h]ere there is no claim that there was any relationship of trust or confidence between the parties.").

For examples of judicial unwillingness to enforce alleged oral agreements to transfer land, see *Anderson v. Mooney*, 279 N.W.2d 423 (N.D. 1979)(refusing to recognize estoppel to deny land sale contract even though alleged purchaser cultivated land for three years).

Of course, where there is no evidence of improvements made on the land, mere allegations of oral contract—even if conceded by the promisor—are inadequate to generate an estoppel claim. See, e.g., *Durham v. Harbin*, 530 So. 2d 208 (Ala. 1988)(refusing to allow nonfraudulent representations to abrogate the statute of frauds).

24. See Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity and Relational Contract*, 77 N.C. L. REV. 551, 556 (1999)("The closer and more interdependent the parties, the less likely promises and agreements will be isolated and clearly spelled out, because the parties operate in accordance with implied understandings, and because the value generated by those implied understandings is greatly enhanced if the reciprocal nature of the duties within the relationship is left unspoken."); cf. Eric A. Posner, Comment, *Norms, Formalities, and the Statute of Frauds: A Comment*, 144 U. PA. L. REV. 1971, 1974-75 (1996)(noting that repeat players in a contract relationship might eschew writings because of a norm against writings in their "business community").

owner, courts have little difficulty finding, and enforcing, the family member's promise. Cases generally involve improvements made by a child to land owned by a parent. Although a child may work on a parent's land even without an express promise, judicial intuition probably suggests that few children give money or property to a parent, and make improvements on their parents' land, unless child and parent have reached an understanding that the parent will give the land (or some equivalent) to the child in return.²⁵ In American society, the norm is that children assist their aging parents, but that wealth generally flows from parent to child, not the other way around.

*Koval v. Koval*²⁶ is illustrative.²⁷ While William Koval was a minor, his parents used money William had inherited to place a down payment on a home. When, some years later, William was involved in a divorce suit, he deeded his interest in the house to his parents. They later sold the house, realizing a \$16,000 profit. William testified that

25. When the family members involved are not as close as child and parent, it would appear even less likely that one family member would give money to another, and make improvements on the other's land, absent an understanding that the land would belong to the improver. Thus, in *Rolland v. Biro*, No. 44632, 1982 WL 2547 (Ohio Ct. App. Nov. 18, 1982), an ex-husband alleged that his ex-wife had orally agreed to transfer to him her one-half interest in a parcel of land. The ex-husband had made payments of \$10,000 in cash to the ex-wife, and subsequently made improvements on the land. In addition, there was testimony that a written deed would have been executed but for a title company's mistaken assertion that the ex-husband already held all interests in the land. Over the objection of the ex-wife's executor, the court invoked the part performance and estoppel doctrines to enforce the ex-wife's oral agreement. *See id.* at *6.

Indeed, even if the family member has made no improvements, but has conveyed title to land in return for a promise to reconvey part of the land, an estoppel claim is likely to succeed. For example, in *Barber v. Fox*, 632 N.E.2d 1246 (Mass. App. Ct. 1994), a sister (and each of six other siblings) conveyed their shares of concurrently owned land to their brother. The six siblings each received monetary compensation for their shares, but the sister did not, instead relying on her brother's promise, at a future time, to reconvey one part of the land on which the sister might build a house. When the brother later refused to convey, the court invoked estoppel principles, concluding that the sisters' conveyance was "exclusively referable" to the oral agreement. *See id.* at 1250.

26. 576 So. 2d 134 (Miss. 1991).

27. For another illustration, see *Roundy v. Waner*, 570 P.2d 862 (Idaho 1977). The Waners, daughter and son-in-law of the Roundys, contended that the Roundys had made an oral agreement to relinquish their equitable interest in property to which the Waners already had legal title (when the Roundys bought the house, title was taken in the Waners' name because the Roundys had been unable to obtain financing due to their advanced age). The Waners made payments on the mortgage note, paid property taxes and insurance, assumed a loan on which Mr. Roundy was obligated, and spent more than \$2,300 on materials for repairs undertaken on the property, which was subsequently sold for \$22,500. The court held that the trial court "was fully justified in reaching a conclusion that the Waners had indeed changed position in reliance upon what they understood to be an oral agreement." *Id.* at 866. The Waner's part performance established that the sale contract, although oral, was enforceable.

in return for keeping the \$16,000 profit, his parents offered to give him a house if he would fix it up. William and his wife made improvements to the house which significantly increased its market value. In fact, his parents obtained a \$25,000 loan secured by the property, even though the property had been worth about \$5,250 before William and his wife began work on the premises. William then asked his parents to give him a deed, but they refused. In response, William and his wife brought an action seeking title, or, alternatively, a judgment for monies expended in improving the realty.²⁸

The Mississippi Supreme Court, relying on estoppel principles, awarded William and his wife a judgment for the outstanding balance of his parents' bank loan, together with an equitable lien on the property. Compelling the parents to give William a deed would have been of little value to William, since his parents had already given the bank—a bona fide purchaser—a deed of trust to the property. Hence, the court awarded William the closest available equivalent to the property itself: money damages equal to the profits his parents had derived from his work—the amount of the bank loan. Moreover, even the court's language suggests that promise, not reliance, is at the heart of the estoppel doctrine:

These principles are based on . . . the belief that a person should do what he says he will do in situations where another party is injured by reliance on the first party representations. . . . [T]he test is whether it would be substantially unfair to allow a person to deny what he has previously induced another to believe and take action on.²⁹

That is, so long as one's representations lead to detrimental reliance, the court held that the party making the representation "should do what he says he will do."³⁰ The court did not, however, say that the party making the representation "should reimburse the promisee for reliance-based losses."

Similarly, where a family member uproots himself to move onto land owned by another family member, and also spends money improving the property, there is a strong likelihood that the parties had an understanding that the property would belong to the improver. As a result, courts are likely to invoke estoppel to sustain the improver's claim to the property.³¹

28. *Kovall v. Kovall*, 576 So. 2d at 135-36.

29. *Id.*

30. *Id.*

31. For example, in *Tozier v. Tozier*, 437 A.2d 645 (Me. 1981), Calvin's parents owned the disputed land as tenants in common. Calvin moved to the land from another town, allegedly on the representation that he could have the disputed land to live on. Calvin, with the help of his parents, then built a house on the land. Later, at the death of Calvin's father, all of the children conveyed to their mother all of their rights in any real estate that might have descended to them at law on the death of their father. The mother then conveyed the disputed land to Richard, Calvin's brother. When Richard brought a forcible entry and detainer action

There is, however, another possible explanation for the judicial willingness to hold the legal title holder estopped to deny a transfer of title to a family member who has made transfers of money or property to the legal title holder, and who has moved to or made significant improvements to the land. Even if the transfers and improvements were not the product of a promise or an understanding between the parties, the title holder's failure to warn the improver that the improver would not acquire legal rights might constitute a violation of prevailing social norms. That violation might, in turn, lead courts to conclude that the title holder has violated a legal duty to protect family members from the harm associated with a mistaken belief about the nature of their dealings. If the legal title holder breaches this tort-like duty, the family member would ordinarily be entitled to the losses suffered as a result of the failure to warn, which need not require transfer of the property. Rather, because reliance damages are so difficult to calculate, courts might transfer title as the best approximation of the damages suffered by the improving family member.

against Calvin, the court held that Richard was not entitled to possession, invoking estoppel as a basis for its decision: "When the donee . . . has made substantial improvements to the land, and the donee has made the improvements in reliance upon the promise to convey the land, courts will enforce the promise to convey." *Id.* at 648. See also *Geiger v. Geiger*, No. 13841, 1993 WL 476247 (Ohio Ct. App. Nov. 16, 1993) (estopping mother from denying promise to transfer to her daughter when her daughter had moved onto the property, had made monthly payments on the property and had made improvements to the property); *Sturlaugson v. Johnson*, No. 36633-5-1, 1997 WL 11842 (Wash. Ct. App. Jan. 13, 1997), review denied by 940 P.2d 654 (Wash. 1997) (preventing mother-in-law and father-in-law from denying transfer to son-in-law and daughter when son-in-law had made payments on the property and made improvements to the property).

There are exceptions to the general tendency of courts to invoke estoppel or part performance when one family member has relied on another family member's apparent oral promise to transfer land. In particular, the Wyoming Supreme Court, in a series of recent cases, has rigidly enforced the statute of frauds. For example, in *Davis v. Davis*, 855 P.2d 342 (Wyo. 1993), the court granted summary judgment to a mother who conveyed disputed property to one of her sons after permitting another son to live on the property and make improvements to it for nearly 30 years. The improving son had begun using the property immediately after his father's death. However, the court refused to use the son's long-term occupancy as a basis for concluding that the mother had promised him the property. Moreover, in *Fowler v. Fowler*, 933 P.2d 502 (Wyo. 1997), the same court held that the statute of frauds prevented a son from enforcing an alleged oral contract against his father, even though the son had given up his job to run the father's ranch and continued to live on the ranch for nearly twenty years. See also *Ferguson v. Ferguson*, 739 P.2d 754 (Wyo. 1987) (finding acts of dominion insufficient to corroborate allegations of oral contract).

There are facts in each of these cases which made the estoppel claims less than compelling. In *Davis*, improvements to the land constituted the only evidence of reliance, while in *Fowler*, the supposed promisee gave conflicting testimony about the content of the supposed oral agreement. However, taken together, the cases strongly suggest that Wyoming courts are less receptive to estoppel claims than are most other courts.

This alternative explanation for cases invoking estoppel as a basis for effectuating a land transfer between family members does not find explicit support in the language of judicial opinions. Nevertheless, the explanation is consistent with the results in these estoppel cases, and, as we shall see, is also consistent with results in other estoppel cases where the promise rationale seems less plausible as an explanation for the estoppel doctrine.

III. SERVITUDES BY ESTOPPEL

Because easements and other servitudes are interests in land, the statute of frauds generally requires that they be accompanied by a writing.³² Nevertheless, when a landowner induces a purchaser or owner of neighboring land to change position by creating a belief that the landowner's own land is subject to an easement or other servitude, the landowner may be estopped to deny the servitude even if the servitude was never reduced to writing.³³

A. Representations by Sellers or Developers

With some frequency, land purchasers seek to restrict a seller's use of neighboring land retained by the seller. Specifically, the purchasers contend that they were induced to purchase (or build upon) the land by the seller's alleged oral representation that the seller's neighboring land would be subject to a restriction. Such estoppel claims are problematic for three reasons. First, the sale of land is generally an event accompanied by formality; because there is every reason to expect that purchasers (or their lawyers, in some states) will insist that important representations be reduced to writing, claims based on oral represen-

32. See, e.g., RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.7 (Tentative Draft No. 1, 1989)(providing that the formal requirements for creation of a servitude are the same as those required for creation of an estate in land).

33. For example the Restatement (Third) of Property provides:

If injustice can be avoided only by establishment of a servitude, the owner or occupier of land is estopped to deny the existence of a servitude burdening the land when:

(1) the owner or occupier permitted another to use that land under circumstances in which it was reasonable to foresee that the user would substantially change position believing that the permission would not be revoked, and the user did substantially change position in reasonable reliance on that belief; or

(2) the owner or occupier represented that the land was burdened by a servitude under circumstances in which it was reasonable to foresee that the person to whom the representation was made would substantially change position on the basis of that representation, and the person did substantially change position in reasonable reliance on that representation.

RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.10 (Tentative Draft No. 1, 1989).

tations generate suspicion.³⁴ Second, in the absence of a writing, evidence that there was a promise is often unreliable, and determining the scope of the promise may be even more difficult. Third, reliance is difficult to establish; even if a seller did make a promise, it is unclear whether the purchaser made the purchase in reliance on the promise, or whether the purchaser would have bought the property (or built on it) even if the seller had made no promise at all.³⁵ Because these problems are nearly insurmountable without some written corroboration of the promise, courts are understandably hesitant to enforce estoppel claims based exclusively on oral representations—at least where the only alleged reliance is purchase of the property. Consequently, in transactions between a developer and purchaser, estoppel claims almost inevitably involve reference to some writing.³⁶ Often, a purchaser attempts to use a developer's subdivision plat as a basis for estopping the developer.

A subdivision plat typically lays out building lots and roads, and may also describe physical features of the subdivision. The plat may also include express easements or use restrictions. When a recorded plat includes express servitudes and the deeds to individual parcels refer to the plat, the restrictions may be enforced without reference to the estoppel doctrine; the writings—the deeds in conjunction with the plat—satisfy the statute of frauds.³⁷ Suppose, however, the plat includes no express servitudes. Does the plat itself provide enough written corroboration of the developer's supposed oral promise to restrict use of the platted land?

34. See, e.g., *Bendetson v. Coolidge*, 390 N.E.2d 1124 (Mass. App. Ct. 1979)(refusing to hold seller of commercial property estopped by alleged representations that he would develop the remaining property as illustrated in a site plan initialed by the buyer and seller; court found no reason to conclude that experienced businessman, advised by counsel, would believe that seller was so casually locking himself into particular development plan).

35. This problem, of course, is a problem only to the extent that estoppel is a reliance-based doctrine rather than a promise-based doctrine. See *supra* notes 4-6 and accompanying text.

36. *But see Nicol v. Nelson*, 776 P.2d 1144, 1147 (Colo. Ct. App. 1989)(holding there was sufficient evidence to support the trial court's finding of an easement based on estoppel when developer had allegedly assured purchasers orally that he would not obstruct their view of the lake by developing lakefront land).

37. Sometimes, even though clear written restrictions limit use of the developer's retained parcels, it is less than clear whether particular landowners may enforce the restrictions. In such situations, however, courts may hold that the developer is estopped to challenge the landowners' right to enforce if sales brochures displayed the landowners' representations made about the retained land. See *White Cypress Lakes Dev. Corp. v. Hertz*, 541 So. 2d 1031 (Miss. 1989).

Generally, as illustrated by *Bennett v. Charles Corporation*,³⁸ the answer is no.³⁹ There, Curry platted a subdivision showing 25 lots, twelve on one block, designated "Block A," and thirteen across the street, on "Block B." Curry sold the entire parcel to Eplin and The Charles Corporation, who built two houses on Block B, one of which was purchased by the Bennetts. The deed described the property by reference to the Curry subdivision plat, but neither the deed nor the plat included any restrictive covenants. Eplin became ill, moved into the second house on Block B, and sold his interest in the land to The Charles Corporation. When the corporation encountered difficulties in obtaining a sewer line for Block A, its president decided to clear the land and develop it as a cemetery. When the first cemetery lot was sold, the Bennetts brought an action seeking to enjoin use of the tract for any purposes other than residential purposes, alleging that Eplin had made an oral promise to develop the tract as a residential housing subdivision. The West Virginia Supreme Court of Appeals held that the Bennetts were not entitled to the injunction, concluding that even if Eplin had made an oral promise to develop the tract for residential purposes, breach of that promise would not entitle the Bennetts to relief unless they could show that, at the time Eplin made the promise, he did not intend to perform.⁴⁰

In *Bennett*, The Charles Corporation did not deny that it had formed an intention to develop a residential subdivision, and it is clear that Eplin had made some sort of representation to the Bennetts. There was, however, no written corroboration of the content of that representation. If the court had granted relief to the Bennetts, it would have opened the door to many unsubstantiated claims that a seller had made representations about future use of retained land. Moreover, the only reliance the Bennetts alleged—the purchase of their home—was equivocal at best; they might well have purchased their home without any representation from the sellers. When the Bennetts bought their house, there were already cemetery lots in the

38. 226 S.E.2d 559 (W. Va. 1976).

39. See also *Huggins v. Castle Estates, Inc.*, 330 N.E.2d 48 (N.Y. 1975) (holding that designation of zoning classification on filed plat map does not estop developer from departing from that zoning classification after municipality amends ordinance).

40. See *id.* at 562-63. The court quoted from its earlier opinion in *Cottrell v. Nurnberger*:

The mere failure or refusal of the vendor in an oral agreement, which is within the Statute of Frauds and for that reason unenforceable, to recognize it as binding or to comply with it does not in itself amount to fraud or inequitable conduct upon which to base estoppel, when, as here, it does not appear that he intended to violate the oral agreement when it was made. . . . The other party to the contract is presumed to know that the contract is unenforceable and that he acts under it at his risk.

Cottrell v. Nurnberger, 47 S.E.2d 454, 461-62 (W. Va. 1948).

vicinity. In fact, the new cemetery lot was no closer to the Bennetts' home than other cemetery lots that had been in place before the Bennetts' home was built. Hence, the court could not be sure that the representation had any effect on the Bennetts' decision to purchase.⁴¹

Courts are even more reluctant to invoke estoppel against a developer when the map shown to the purchasers has not been recorded⁴² — especially if a recorded plat imposes less onerous restrictions or restricts fewer parcels of land. Unless, the developer has, through its behavior, distinguished between its general development intentions (evidenced by an unrecorded map) and its intent to create binding restrictions (evidenced by a recorded subdivision plat, replete with express restrictions), a court is unlikely to conclude that the developer made an express, serious, promise to abide by the unrecorded map. In other words, the purchaser should recognize that if the developer intended to make a binding commitment, developer would have done so with greater formality.

*Kincheloe v. Milatzo*⁴³ is illustrative. In the office of the developer's real estate agent hung a map of the "Milatzo Subdivision," which showed all lots to be one-half acre in size. The developer then filed and recorded a plat of a portion of the subdivision—known as the "First Filing"—which expressly restricted the lots to single-family residences on one-half acre lots. The developer later sought to develop a different portion of the subdivision with smaller lots. The court held that oral representations, together with the Milatzo Subdivision map, did not estop the developer from developing smaller lots. The court found no clear and convincing proof that the developer induced purchasers to purchase the land in the "First Filing" through representations on which the purchasers had a right to rely. The court

41. Although the *Bennett* case involved purchasers seeking to enforce an alleged oral promise made by a seller, occasionally, the tables are turned, and sellers seek to enforce a promise made by purchasers. If there is no written corroboration from the promise, the typical result is similar—no enforcement. See *Cooper v. Re-Max Wyandotte County Real Estate, Inc.*, 736 P.2d 900 (Kan. 1987)(rejecting an estoppel argument questioning the existence of an agreement and the existence of reliance when seller sells lot adjacent to her home, and later seeks to prevent construction of building for operation of a real estate business, alleging an oral agreement by purchaser to build only a small, 4,000 square-foot medical building).

42. There are exceptions. One of the most frequently cited is *Ute Park Summer Homes Association v. Maxwell Land Grant Company*, 427 P.2d 249, 253 (N.M. 1967), *appeal after remand*, 494 P.2d 971 (N.M. 1971), in which the court held that an unrecorded plat map depicting a golf course was sufficient, together with oral representations, to estop the developer from using the golf course property for another purpose.

43. 678 P.2d 855 (Wyo. 1984).

emphasized that it should have been apparent to purchasers that the covenants on file pertained to the "First Filing" lots only.⁴⁴

Purchaser has a better chance of prevailing on an estoppel claim when the purchaser has some written corroboration of the seller's promise (beyond the plat itself). For instance, if the seller has distributed sales brochures representing that certain land would be maintained for open space or recreational purposes, the representations in the brochures are often sufficient to permit purchasers to establish easement by estoppel.⁴⁵ Moreover, even if the seller has never imposed an express written restriction on his own land, a court may hold the seller estopped from denying the existence of the restriction if the seller has prepared a subdivision plat, and then imposed an express restriction in the deed to every lot sold within the subdivision. These two factors in combination create greater confidence that the seller has made an identifiable representation.

Thus, in *PMZ Oil Company v. Lucroy*,⁴⁶ the Mississippi Supreme Court held a developer estopped from building six townhouse condominiums on a lot retained by the developer after the developer had orally represented to a purchaser of a neighboring lot that only single-family homes would be permitted within the subdivision. As in the *Bennett* case, the developer had displayed to the purchasers a subdivision plat. Unlike *Bennett*, however, as the developer sold off the lots, it included in each deed an express covenant limiting development to one residence per lot. The court held that the developer "in good conscience may not be allowed to disregard the covenants it had imposed upon others to whom it sold lots."⁴⁷ The developer, by preparing and displaying a subdivision plat, and by including the restrictions in the deeds to the lots sold, led purchasers to believe that developer would abide by the same restrictions on the land he retained. In addition,

44. See *id.* at 863. But see *Knight v. City of Albuquerque*, 794 P.2d 739 (N.M. Ct. App. 1990)(holding that developers who depicted a golf course on a subdivision plat were estopped from using the golf course property for other purposes even though the developer explicitly reserved the right to build hotels, cottages, and other facilities on any tract in the plat without permission of the owner of any lot in the subdivision).

45. See *Shalimar Ass'n v. D.O.C. Enters.*, 688 P.2d 682, 691 (Ariz. Ct. App. 1984)(involving sales brochures that referred to golf course depicted on recorded plat; developer's successors held estopped to build on golf course); *Haines v. Minnock Constr. Co.*, 433 A.2d 30, 31 (Pa. Super. Ct. 1981)(involving sales brochure that represented "[w]e left untouched the generous and quiet forest," while accompanying map designates area adjacent to purchaser's townhouse as "open space"; developer held estopped from building additional townhouses in the open space).

46. 449 So. 2d 201 (Miss. 1984).

47. *Id.* at 207.

because the restrictions did appear in writing, a court would have no difficulty ascertaining the content of the restrictions.⁴⁸

So far, we have examined estoppel claims advanced by purchasers seeking to bind developers to restrictions on the use of lots retained by the developer. Estoppel doctrine is also available to purchasers seeking to establish affirmative easements over land retained by the developer. In this situation, the plat alone, without express restrictions, may be enough to support an estoppel claim. In particular, a number of courts have held that once a developer records a plat which includes roads, the developer is estopped to deny purchasers within the subdivision easements to use those roads.⁴⁹ This does not mean, however, that developer is estopped from changing any detail that appears on the plat map, or that developer is required to give individual purchasers access to every area on the plat map not designated as a saleable lot.

Thus, in *Jones v. Beavers*,⁵⁰ the Virginia Supreme Court held that designation of a "landing" on a recorded plat of a waterfront subdivision did not estop the owner of the landing from excluding the purchasers of other lots. The court distinguished cases involving streets or alleys, suggesting that because streets and alleys are usually essential for access to property, "it is only natural" to presume that designation of a street or alley on a subdivision plat creates an easement to use the road.⁵¹ By contrast, the court indicated that the word "landing" sometimes signifies a private use, and held that the purchasers were not entitled to a presumption that the plat designation, by itself, created an easement in the landing.⁵²

In other words, courts recognize that subdivision plats are in part description, and in part promise. Of course, a developer could expressly grant all purchasers easements over precisely described roads within the subdivision, but courts recognize that even without express grants, purchasers will generally presume that the subdivision plat constitutes a promise to keep designated roads available for their use.⁵³ Hence, the developer is estopped from denying purchasers ac-

48. *Cf. Shalimar Ass'n v. D.O.C. Enters.*, 688 P.2d at 684 (recognizing that recorded plat shows golf course; no express restriction on golf course parcel, but deeds to all other parcels prohibit structures within 30 feet of golf course property and provide that "[l]andscaping shall be planned . . . so as to avoid undue obstruction of the view of the golf course from the lots").

49. *See Cason v. Gibson*, 61 S.E.2d 58 (S.C. 1950). Other courts have held estoppel unnecessary, finding that filing of a plat showing roads creates a dedication of the roads or an implied easement over the roads. *See, e.g., Boucher v. Boyer*, 484 A.2d 630 (Md. 1984); *Krzewinski v. Eaton Homes, Inc.*, 161 N.E.2d 88 (Ohio Ct. App. 1958).

50. 269 S.E.2d 775 (Va. 1980).

51. *See id.* at 779.

52. *See id.*

53. *See id.* at 778 (quoting *Lindsay v. James*, 51 S.E.2d 326, 331 (Va. 1949)).

cess to those roads. And, because the developer's successors-in-interest should know that purchasers will treat road designations as promises, they, too are bound by the recorded plat.⁵⁴ When the plat designation refers to a physical feature less common and less necessary than roads, however, it is less likely that a court will treat the designation itself as a promise. Thus, if a landowner wants access to a beach, or a landing, the landowner must generally obtain an express easement. Of course, if the purchaser acts on the plat by building improvements as if the developer had given the purchaser an easement to build improvements—docks, for instance—on common areas, the developer will be estopped to deny an easement if the developer does not take prompt action to stop the purchaser from making the improvements.⁵⁵

In estoppel cases involving developers, the focus is generally on the developer's representations, not the developer's duty to disclose information or intentions to potential purchasers. Developers and purchasers generally operate at arms length, and courts are loathe to imply servitudes from the conduct or silence of a developer.

In enforcing the developer's representations, however, do courts focus on reliance or promise? Unfortunately, these cases provide no strong evidence to support either position. The general insistence on written corroboration of the developer's representation—either through sales brochures or plat maps — might seem, at first glance, to suggest a focus on promise. However, that insistence might instead reflect a belief that purchasers do not act in reliance on oral promises by developers. Thus, in the absence of written corroboration, there is no need to protect a purchaser's reliance interest.

Examining the remedies awarded in cases where courts do find estoppel is no more helpful. When a purchaser successfully invokes estoppel, courts universally enforce developer's promise by creating a servitude in purchaser's favor. In this context, however, the award of specific performance does not prove much. Because the purchaser's supposed reliance is purchase of the property, no relief other than specific performance would generally be feasible. A court could order rescission of the sale contract, but both developer and purchaser would generally prefer specific performance to rescission—purchaser, having moved into a home, generally doesn't want to leave; and developer

54. The same principle may apply to other necessities, like sewer lines. One court has held that if the developer has built a sewage system which feeds onto property owned by the developer, and the developer has maintained control of the system, the developer's successors are estopped from contending that they are not bound to maintain the system. See *Friends of the Sakonnet v. Dutra*, 749 F. Supp. 381 (D.R.I. 1990).

55. See *Allee v. Kirk*, 602 S.W.2d 922 (Mo. Ct. App. 1980)(holding that license to use waterfront strip to build docks cannot be revoked once docks have been constructed).

does not want to resell all of the homes he has once sold. In the unusual case where rescission would be attractive to the developer, most likely because market prices have increased since the original sale, rescission would not adequately protect the purchaser's reliance interest, since return of the purchase price would not leave her with the same opportunities she had at the time of the original purchase. As a result, neither examination of substantive law nor examination of remedies sheds much light, in this context, on whether promise or reliance is of critical importance in the estoppel doctrine.

B. Representations by Neighbors

The relationship between neighbors is, in several respects, different from the relationship between developer and purchaser. A purchaser does not generally expect the developer to maintain a continuing presence once all of the lots are sold off. By contrast, neighbors understand that they will continue to live with each other, often for years to come. The ongoing relationship shapes the dealings between neighbors. First, even if neighbors are not friends or confidantes, the relationship creates a bond of trust. Each knows that the other can retaliate, in a myriad of ways, for unneighborly behavior. As a result, each can reasonably expect the other to keep her word even without any threat of legal sanction. Neighbors have less need than strangers to resort to legal formalities, because they have less need to rely on legal enforcement. We should expect, therefore, that agreements between neighbors will be reduced to writing less often than agreements between strangers. And if the neighbors are friends or confidantes, the tendency to dispense with writings will be even stronger.⁵⁶

56. The court in *Shepard v. Purvine*, 248 P.2d 352 (Or. 1952), in finding an easement by estoppel to use water from a neighbor's spring, offered a classic statement of the foundation for holding a neighbor estopped by oral representations:

These people were close friends and neighbors, and they were not dealing at arm's length. One's word was considered as good as his bond. Under the circumstances, for plaintiffs to have insisted upon a deed would have been embarrassing; in effect, it would have been expressing a doubt as to their friend's integrity. We do not believe the evidence warrants a conclusion that plaintiffs were negligent in not insisting upon a formal transfer of the rights accorded.

Id. at 361-62.

On the other hand, when the parties are already in an adversarial position, and have made it clear that they intend to resolve their disputes only through a written agreement, a party is unlikely to persuade a court that his counterpart, by virtue of oral statements, should be estopped to deny the existence of an easement. See *Turner v. Floyd C. Reno & Sons, Inc.*, 696 P.2d 76, 79 (Wyo. 1985)(holding that the neighbor who refused to sign proposed statement agreement was not estopped by any oral statements because "the parties intended a written instrument be a condition precedent to making operational or effective any understandings reached by them at the settlement conference").

Consequently, in disputes between neighbors, the allegation that one party made a serious oral promise is more plausible than when the dispute is between developer and seller. As a result, courts are more willing to hold neighbors estopped by oral promises. Of course, mere allegations are not enough to permit enforcement. But when courts examine alleged representations made by neighbors, expenditures made in reliance on the representations often provide valuable evidence about the existence and content of the representations. In disputes between developers and purchasers, the purchaser typically alleges that she relied by purchasing the property. That allegation of reliance is difficult to evaluate; the purchaser might reasonably have purchased the property even without assurance that neighboring parcels would be restricted to $\frac{1}{2}$ acre lots, or limited to residential use only. By contrast, when a neighbor makes an estoppel claim, the neighbor typically demonstrates that she expended money in a way that would have made no sense in the absence of an understanding that she had a servitude over neighboring land.

Roadway agreements provide the most common example. The facts in *Cleek v. Povia*⁵⁷ illustrate the classic pattern. Cleek and Malone, neighboring landowners, agreed to build a road along their common boundary. Although the parties split the cost of the roadway equally, 90% of the roadway was placed on the Cleek property. Nineteen years and nine months after the roadway was built, Cleek's widow brought a trespass action against Povia, Malone's successor-in-interest.

The Alabama Supreme Court held that Cleek was estopped to deny existence of the easement.⁵⁸ It would have made no sense for Malone to pay half the cost of building a road on Cleek's land if Cleek were free to bar Malone from using the road once built.⁵⁹ Hence, the expenditures themselves provided the court with reliable corroboration

57. 515 So. 2d 1246 (Ala. 1987).

58. The court invoked both the theory that an easement by estoppel had been created, and the "similar" theory that an "easement by contract" had been created. *See id.* at 1248.

59. *See also* Higgins v. Blankenship, 605 S.W.2d 493 (Ark. Ct. App. 1980)(holding that when landowner furnishes gravel for construction of roadway over neighbor's land, neighbor held estopped to deny easement); Kohlleppe v. Owens, 613 S.W.2d 168 (Mo. Ct. App. 1981)(holding that when landowner builds new road and fence based on oral agreement, part performance doctrine permits enforcement of agreement); Shrewsbury v. Humphrey, 395 S.E.2d 535 (W. Va. 1990)(finding easement by estoppel where landowner maintained roadway in winter, improved it with gravel, and used it for eight years; landowner also testified that he purchased the property on representation that he could use the disputed roadway). *But see* Tallarico v. Brett, 400 A.2d 959 (Vt. 1979) (discussed at *infra* notes 76-77 and accompanying text).

of the understanding between the parties.⁶⁰ Moreover, the court had no difficulty binding the successors-in-interest because "[t]he open and obvious nature of the easement is sufficient to put any successor[s] in interest on notice."⁶¹

Even when the reliance does not involve improvement to the roadway itself, courts invoke the easement by estoppel doctrine when a landowner's expenditures make it clear that he relied on his neighbor's representation. Thus, if a landowner orients his house in a way that would make sense only if he believed he had a right to use his neighbor's road, courts will hold the neighbor estopped from denying access to the road.⁶²

Of course, even when roads are involved, courts will not find an easement by estoppel when the improvements made by the party claiming "estoppel" are not significant,⁶³ or would have been sensible

60. See also *Shipp v. Stoker*, 923 S.W.2d 100 (Tex. App. 1996, writ denied) (finding that defendant made improvements on disputed roadway after alleged agreement between predecessors to grant an easement in return for grant of certain other property).

61. *Cleek*, 515 So. 2d at 1248; see also *Shipp*, 923 S.W.2d 100; cf. *Holden v. Weidenfeller*, 929 S.W.2d 124, 132 (Tex. App. 1996, writ denied) (holding easement by estoppel where recorded deed made reference to easement concluding that it burdens successors because plaintiff "acknowledges seeing a gate from the old road . . . in plain view before he bought the property").

62. For example, in *Hester v. Chambers*, 576 S.W.2d 195 (Ark. 1979), the Chambers bulldozed a road across their property, and caused the county to grade the road up to the boundary fence separating their property from the Hesters' neighboring parcel. The Chambers then dedicated a road right-of-way to the county. Three years later, the Hesters asked Chambers whether the road was a county road, informing him that they intended to build a house in a way that would make use of the road. Chambers assured them that the road was a county road. Later, when his wife and son-in-law informed Chambers that the dedicated county road stopped ten feet short of the Hesters' boundary, Chambers told them that he would wait until after the Hesters built their house before mentioning the ten feet to them. When the Hesters built the house, Chambers wrote a letter indicating that the road stopped ten feet short of the boundary. Five years later, after the Hesters had used the road for access to their house, the Chambers sought to block access to the road. The Arkansas Supreme Court rejected their attempt, holding that the Hesters had acquired an easement by estoppel. See *id.* at 195-96; see also *Zivari v. Willis*, 611 A.2d 293 (Pa. Super. Ct. 1992) (involving driveway and garage built to connect to neighbor's road; court holds neighbor estopped to object after giving oral permission); *Holden v. Weidenfeller*, 929 S.W.2d 124 (Tex. App. 1996) (involving home built near intersection of disputed road; court found easement by estoppel to use that road even though deed is not specific about location of right of way); *Meredith v. Eddy*, 616 S.W.2d 235 (Tex. Civ. App. 1981, no writ) (involving home built at end of disputed road; court found easement by estoppel).

63. See, e.g., *Roberts v. Allison*, 836 S.W.2d 185 (Tex. App. 1992, writ denied) (having land surveyed insufficient improvement to support easement by estoppel); *Bickler v. Bickler*, 391 S.W.2d 106 (Tex. Civ. App. 1965, writ granted), *aff'd in part and rev'd in part*, 403 S.W.2d 354 (Tex. 1966) (planting of shrubs on his own property as if the disputed driveway was a part of the property held not sufficient

even if the neighbor had never granted an easement.⁶⁴ In these cases, the actions of the parties provide inadequate corroboration of the supposed representation made by the neighbor. Similarly, if the neighbor who has supposedly made an oral representation has consistently and in writing indicated that he intends to do no more than give permission for temporary use, courts will not estop the neighbor from denying that he has created an easement.⁶⁵ In each of these situations, there is insufficient evidence to establish that the parties intended to create a permanent right.⁶⁶

to support an estoppel claim; shrub planting might make sense even if no easement had been contemplated).

64. *Woods v. Libby*, 635 A.2d 960 (Me. 1993), provides an example. A zoning ordinance would have precluded the landowners from building on their premises unless they did so within one year. The landowner's parcel was on a steep grade which made it difficult to construct a driveway. The landowner and neighbor agreed that the landowner could build and use a driveway across the neighbor's parcel, at the landowner's cost. Years later, after the original landowner had sold the parcel, the neighbor sought to block the successor's access to the driveway. The trial court rejected the successor's easement by estoppel claim, concluding that the parties had intended to give the original landowner only a temporary right to use the driveway—a sensible conclusion in light of the imminent expiration of the right to build on the parcel. The Maine Supreme Court affirmed, finding support in the record for the trial court's conclusion, but noting that the record also contained support—particularly the landowner's long-term use of the roadway—for the opposite conclusion. See *id.* at 961-62; see also *Klobucar v. Stancik*, 485 N.E.2d 1334 (Ill. App. Ct. 1985)(finding no easement by estoppel arose to use neighbor's driveway to reach parking places in back of landowner's house even though landowner had configured house so that there was no alternative access to parking spaces; court noted that when house was built, street parking was permitted, and raised possibility that landowner might obtain access to spaces from another neighbor).

65. See *Ceres Ill., Inc. v. Illinois Scrap Processing, Inc.*, 500 N.E.2d 1 (Ill. 1986)(finding no easement by estoppel arises when parties intended execution of writing to be condition precedent to creation of easement); *Zimmerman v. Summers*, 330 A.2d 722 (Md. Ct. Spec. App. 1975)(finding no easement by estoppel when supposed servient owner expressly refused to sign written document creating express easement); *Brown v. Eoff*, 530 P.2d 49 (Or. 1975)(finding no easement by estoppel when parties negotiated for express easement while represented by counsel, but never reached formal written agreement); *Wilson v. McGuffin*, 749 S.W.2d 606 (Tex. App. 1988, writ denied)(finding that plaintiff informed defendant by letter, before major improvements were made, that he was granting permission to make improvements, but that the permission was consistent with his grandfather's recorded affidavit representing that use of the road was permissive only).

These cases are consistent with Professor DeLong's notion that estoppel doctrine should not bind parties to respect reliance expenditures made by others when the party has expressed an intention not to be legally bound. See DeLong, *supra* note 4.

66. On the other hand, when the parties have reduced their agreement to writing, but the writing is inadequate to establish a formal easement, the dominant owner may need to show less reliance than would otherwise be the case; the written agreement provides good evidence of the parties' intentions. Thus, in *Shearer v. Hodnette*, 674 So. 2d 548 (Ala. Civ. App. 1995), one landowner prepared a docu-

In general, courts are more reluctant to find easements by estoppel when agreements between neighbors involve matters less obvious, upon physical inspection, than roads.⁶⁷ Even when a landowner has clearly relied on a neighbor's promise—as when the landowner lays pipe in reliance on a neighbor's promise to permit use of a well—courts are at best divided about whether the neighbor should be estopped from revoking permission to use the well.⁶⁸ The problem cannot be the clarity of the understanding between the parties, because courts have been reluctant to invoke estoppel even when the parties have reduced their understanding to a written agreement.⁶⁹ The likely explanation rests, at least in part, on fear that successors-in-interest will lack the means to discover unrecorded easements that would not become obvious upon routine inspection of the property. Thus, a purchaser may have no way of knowing that his predecessor

ment giving himself and his wife a personal right to use a road to reach their home. Although the court concluded that the document created only a license, the court found that \$2,000 in road upkeep (spent over a 25-year period) was enough to estop neighbors from blocking the road. The court also noted that the landowner had granted the Water and Sewer Board an easement which permitted connection to the homes of the servient owners, but that reliance was equivocal because the Water and Sewer Board repaved and widened the disputed road, and built a new road, in exchange for the sewer easement. *See id.* at 551. *But see* Stillwater Columbia Ass'n v. Shepherd, 727 P.2d 596 (Okla. Ct. App. 1986) (finding no easement by estoppel despite written grant of permission to create an exit door in neighboring lodge premises, together with expenditure of about \$1,800 to cut the wall and install the door).

67. When easements are apparent from physical inspection, the combination of oral promise and detrimental reliance generally suffices to permit enforcement. *See, e.g.,* Noronha v. Stewart, 245 Cal. Rptr. 94 (Ct. App. 1988) (involving neighbor who gave oral permission to construct an encroaching reinforced wall at the top of a slope near the border between the two parcels; after landowner spent \$8,000 on the wall, court concluded that neighbor's successor was estopped from removing the wall).
68. For cases refusing to find estoppel, *see* Doyle v. Peabody, 781 P.2d 957 (Alaska 1989); Shultz v. Atkins, 554 P.2d 948 (Idaho 1976). *But see* Waters v. Pervis, 264 S.E.2d 551 (Ga. Ct. App. 1980) (holding that oral grant of right to use sewer line, together with expenditures for maintenance, repair and improvement of pumping station, creates easement by estoppel); Mund v. English, 684 P.2d 1248 (Or. Ct. App. 1984) (holding that oral grant of right to use a well, together with shared installation costs and operating expenses, creates an easement by estoppel). *Cf.* Pinkston v. Hartley, 511 So. 2d 168 (Ala. 1987) (affirming trial court determination that easement by implication existed for sewer lines because lines were reasonably necessary at severance; indicated that servient owner was estopped from objecting to relocation of sewer lines when he gave oral permission and did not object to new location until eight months after the lines had been laid).
69. For example, in *Shultz v. Atkins*, 554 P.2d 948 (Idaho 1976), the court refused to conclude that the landowner had acquired an easement or a license to use a neighbor's well even though the parties' predecessors had reduced their understanding to writing, and even though neighbor's deed recited that the transfer was subject to a "culinary or water use easement and agreement." *Id.* at 950.

gave a neighbor a right to use a well.⁷⁰ That is, whatever the understanding between the initial parties to the arrangement, that arrangement will not be treated as a permanent easement if purchasers would have no reasonable means of discovering the arrangement or its terms.⁷¹ Indeed, even if a particular purchaser knows of the terms, courts may be reluctant to treat the arrangement as an easement for fear that future purchasers might then be burdened by terms they could not readily discover.⁷²

When, despite the absence of any writing, one landowner makes roadway improvements on a neighbor's land, the inference is strong that the improvements reflect an oral understanding between the parties. No other explanation is as plausible for the improver's action and the neighbor's failure to react. Suppose, however, the parties (or their predecessors) have created an express written easement. Suppose further that the dominant owner mistakenly improves the wrong roadway. If the servient owner takes no action in response, but later seeks removal of the roadway, can the dominant owner claim an easement by estoppel to use the improved roadway?

This situation presents a more difficult problem because the inference that the improvements reflect some representation made by the

70. *Doyle v. Peabody*, 781 P.2d 957 (Alaska 1989), is illustrative. Before Doyle finished building his house, his neighbor gave Doyle permission to tap into his neighbor's well, and Doyle agreed to pay \$12 per month for use of the well. When the neighbor sold the premises, he informed his successor of the arrangement, and Doyle continued to make the annual payments. When the successor sold to Peabody, however, the successor did not mention the water arrangement to Peabody. Peabody later attempted to cut off Doyle's water supply, and the court sustained his effort, noting that any license Doyle held before the conveyance to Peabody did not survive that conveyance. *See id.* at 961-62.

71. A similar concern might underlie the result in *Eliopoulos v. Kondo Farms, Inc.*, 643 P.2d 1085 (Idaho Ct. App. 1982). There, the parties orally agreed that Kondo would have the right to deposit waste water on land owned by Eliopoulos. Kondo spent \$500 in reliance on the agreement. The court concluded that Kondo had acquired an irrevocable license by estoppel, but that the license would last only as long as necessary for Kondo to recoup its investment. In that case, the court concluded that six years of draining waste water had been sufficient to recoup the investment.

This approach—like rejecting easements by estoppel altogether—provides protection to successors-in-interest against difficult to discover unwritten easements. *See id.* at 1087-88. *But see* *Fast v. DeRaeve*, 714 P.2d 1077 (Or. Ct. App. 1986) (finding easement by estoppel to flood neighboring land when landowner had built dam in reliance on oral promise); *Kovach v. General Tel. Co.*, 489 A.2d 883 (Pa. Super. Ct. 1985) (holding that license to maintain power wires had become irrevocable as a result of telephone company's expenditures; successors bound because they indicated awareness of the equipment when they purchased the property).

72. Compare *Shultz v. Atkins*, 554 P.2d 948 (Idaho 1976), where the court refused to construe a water use agreement as an easement, even though successor-in-interest had notice of the arrangement.

servient owner is much weaker. A more plausible explanation for the dominant owner's action is that he improved the roadway in mistaken reliance on the language of the written easement.⁷³

If the estoppel doctrine were designed primarily to enforce promises supported by strong, albeit oral, evidence, one would expect courts in this situation to hold that the dominant owner has not acquired an easement over the improved roadway. Unless the servient owner's failure to speak in response to his neighbor's improvement is itself treated as an implicit representation that the dominant owner may continue to use the improved roadway,⁷⁴ the servient owner has made no promise or representation on which the dominant owner can claim to have relied. A number of courts have refused to find an easement by estoppel in this situation.⁷⁵

*Tallarico v. Brett*⁷⁶ illustrates this position. The Bretts acquired an express twelve-foot wide easement over a described route across

73. An analogous situation arises if a landowner who holds an easement appurtenant buys adjacent land and seeks to use the easement to serve that land. The landowner may allege that the servient owner made representations that induced the landowner to purchase the adjacent land, but the landowner might well have purchased the land not in reliance on the servient owner's representations, but in reliance on the mistaken belief that the terms of the easement permitted use for non-appurtenant land. Hence, the allegations of representations by the servient owner do not have a strong indicia of reliability. In cases like this, courts are unlikely to find the servient owner estopped from prohibiting use for non-appurtenant land. See *Jordan v. Rash*, 745 S.W.2d 549 (Tex. App. 1988, no writ).

74. A number of courts have held that the servient owner has no duty to speak in this situation. See *Storms v. Tuck*, 579 S.W.2d 447 (Tex. 1979); *Tallarico v. Brett*, 400 A.2d 959 (Vt. 1979).

75. An analogous problem arises when a deed creating an easement provides that the easement will terminate if the dominant owner takes specified actions, and the servient owner then stands by and watches the dominant owner take those actions. At least one court has held that in that situation, the servient owner is not estopped to claim termination by the terms of the written instrument creating the easement.

In *Eis v. Meyer*, 566 A.2d 422 (Conn. 1989), the deed creating the easement granted the dominant owner a right of way which would terminate when the dominant owner built any new buildings, or enlarged any existing buildings, on the dominant owner's land. The dominant owner informed the servient owner of his intent to build an addition to his kitchen. The servient owner, "consciously aware that the construction would be in violation of the easement, did not respond or react when she was told of the plans." *Id.* at 423. The court held that the servient owner had no duty to inform the dominant owner of the conditions of the easement, or of her intention to enforce her rights under the easement. The court emphasized that the express terms of the easement were unambiguous. See *id.* at 425.

76. 400 A.2d 959 (Vt. 1979).

For another example, see *Storms v. Tuck*, 579 S.W.2d 447 (Tex. 1979). Tuck, who owned 1100 acres of land, purchased three-quarters of an acre, together with a roadway easement across from the Storms' land. In language that was less than crystal clear, the original grant of the easement made the easement appurtenant to a ten-acre parcel of which the three-quarters of an acre was a part.

the Pearsons' neighboring land. At the time the Bretts acquired the easement, an existing roadway crossed the Brett-Pearson property line. The roadway's location deviated from the described easement by as much as four feet. Not knowing of the deviation, the Bretts began using the existing roadway, paved the portion on their own land, and erected a telephone pole immediately adjacent to the existing roadway. They continued to use the roadway until the Pearsons' successors, the Tallaricos, sought to bar the Bretts from using the portion of the roadway that deviated from the described easement. The Vermont Supreme Court rejected the Bretts' claim that they had acquired an easement by estoppel over the existing roadway. The court held that the Pearsons' acquiescence and silence was insufficient to create an estoppel, especially because the Bretts' deed gave them notice of the easement's proper location.⁷⁷

On the other hand, if the estoppel doctrine were designed primarily to enforce a neighbor's duty to warn his neighbor about the parties' mutual rights in order to prevent the neighbor from making useless expenditures based on a mistaken understanding of those rights, one would expect courts to find easements by estoppel in this situation. In fact, there are cases to support this position. In *Vrazel v. Skrabanek*,⁷⁸ a dominant owner had acquired a dedicated easement over the servient's land. The dominant owner leveled and graded a different roadway, and used it for more than 50 years. Meanwhile, the servient owner had blocked off the dedicated easement. The court held that the dominant owner had not obtained a prescriptive easement over the leveled roadway because the initial use had been permissive. Instead, the court held that the dominant owner had obtained an easement by estoppel over that roadway.⁷⁹ In particular,

Tuck then paved the entire three-quarters of an acre, and the roadway easement, at a total cost of \$6,000, in the apparent expectation that he could use the roadway to service his 1100 acres. After the roadway was built, the Storms objected, and Tuck claimed an easement by estoppel. In rejecting Tuck's claim, the court concluded that the Storms had no duty to speak out and protest the building of the road. *See id.* at 449. There, however, the Storms brought an action to protest the road within three weeks after Tuck first bought the three-quarters acre. Perhaps, then, the court concluded that it would have been unfair to estop the Storms from bringing their claim when they had little practical opportunity to sue before they did.

77. *See Tallarico v. Brett*, 400 A.2d 959, 963-64 (Vt. 1979). Specifically, the court wrote:

"There is no breach of duty or culpability . . . associated with a failure to disclose information already in the possession of the party asserting the estoppel." *Id.* at 964.

78. 725 S.W.2d 709 (Tex. 1987).

79. *See id.* at 712. Indeed, had it not been for statements in earlier Texas opinions, particularly *Othen v. Rosier*, 226 S.W.2d 622 (Tex. 1950), it appears likely that the court in *Vrazel* would have held that *Vrazel* had acquired an easement by prescription. The jury had found adverse use by *Vrazel*'s predecessor for more

the court suggested that when a servient owner acquiesces in a change of easement location, the servient owner may be estopped to claim the former location to be the true one.⁸⁰

C. The Restatement

The Restatement (Third) of Property (Servitudes) appears to recognize that an express oral promise is not necessary for creation of a servitude by estoppel. The Restatement includes two provisions dealing with creation by estoppel. First, Section 2.9, entitled "Exception to the Statute of Frauds," provides that the consequences of failure to comply with the statute of frauds does not apply if the servitude's beneficiary, in reliance on the servitude, "has so changed position that injustice can be avoided only by giving effect to the parties' intent to create a servitude."⁸¹ The references to the "parties' intent" and the statute of frauds indicates that the drafters have in mind express promises.

By contrast, section 2.10 of the same Restatement, entitled "Creation by Estoppel," does not appear to require an express promise. Section 2.10 permits creation of a servitude to avoid injustice when an "owner or occupier permitted another to use . . . land under circumstances in which it was reasonable to foresee that the user would substantially change position believing that the permission would not be revoked."⁸² Thus, the Restatement appears to endorse the (somewhat controversial) position that a landowner has a duty to warn a neighbor that no servitude exists if the neighbor would have reason to believe, from the landowner's actions, that a servitude does, in fact, exist.

IV. TERMINATION OF SERVITUDES

When a servient owner makes expenditures on his own land which make it impossible for the dominant owner to use an easement, the servient owner often argues that because the dominant owner did not immediately object to the servient owner's improvements, the ease-

than 10 years, but the Texas appellate courts held that the use had been both permissive and non-exclusive. In other states, the same use would have entitled Vrazel to a prescriptive easement, making it unnecessary to stretch the estoppel doctrine to protect Vrazel.

80. See *Vrazel v. Skrabanek*, 725 S.W.2d at 712 (citing *Dortch v. Sherman County*, 212 S.W.2d 1018, 1021 (Tex. Civ. App. 1948, no writ)).

81. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.9 (Tentative Draft No. 1, 1989).

82. RESTATEMENT (THIRD) OF PROPERTY SERVITUDES § 2.10 (Tentative Draft No. 1, 1989). Section 2.10(2) provides for creation by estoppel when the owner or occupier represents that a servitude exists under circumstances where it was reasonable to foresee reliance.

ment was terminated by estoppel.⁸³ These estoppel claims are rarely successful. Their high failure rate suggests strongly that estoppel doctrine operates primarily to enforce explicit promises or those implied from the nature of the parties' relationship.

When one landowner builds a roadway across a neighbor's land, the neighbor is unlikely to be ignorant of the roadway. If the neighbor does not object, courts are likely to assume that the failure to object reflects an understanding between the parties, an understanding that estops the neighbor from objecting after the fact. By contrast, when the owner of land subject to an easement makes expenditures that obstruct the easement, the dominant owner's failure to object need not reflect any understanding between the parties. The dominant owner may be unaware of the servient owner's "improvements," perhaps because, without commissioning a survey, he does not realize that the improvements obstruct his easement. In such cases, courts do not generally hold the easement terminated by estoppel, because the improvements provide uncertain evidence that the dominant owner understood he was relinquishing any rights.

For example, in *Mueller v. Hoblyn*,⁸⁴ Hoblyn's deed described precisely a 20-foot easement across Mueller's property.⁸⁵ Hoblyn and his

83. See *Bache v. Owens*, 929 P.2d 217 (Mont. 1996); *Mueller v. Hoblyn*, 887 P.2d 500 (Wyo. 1994).

Moreover, the Restatement (Third) of Property: Servitudes provides for modification or termination by estoppel in section 7.6, which provides:

A servitude is modified or extinguished when the person holding the benefit of the servitude communicates to the party burdened by the servitude, by conduct, words, or silence, an intention to modify or terminate the servitude under circumstances in which it was reasonable to foresee that the burdened party would substantially change position on the basis of that communication, and the burdened party did substantially and detrimentally change position in reasonable reliance on that communication.

RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.6 (Tentative Draft No. 6, 1987). Comment (a) to the section provides that "courts should be cautious in applying estoppel, particularly where the servitude in question is of substantial value to the dominant estate." RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.6 cmt. a (Tentative Draft No. 6, 1997).

84. 887 P.2d 500 (Wyo. 1994); see also *Bache v. Owens*, 929 P.2d 217 (Mont. 1996) (finding that where defendant constructed a building atop plaintiff's roadway easement construction of the building did not terminate the easement by estoppel).

85. In fact, it appears that neither Mueller, the servient owner, nor the servient owner's predecessor, ever specified the location of the easement. The deed to Mueller's predecessor created an easement not to exceed 20 feet in width, "which shall be fenced by [dominant owner]." *Mueller v. Hoblyn*, 887 P.2d at 503. The deed to Mueller was expressly made "[s]ubject to easements of record." *Id.* Only in a deed from the original dominant owner to a predecessor of Hoblyn was the easement location specified. See *id.* The court nevertheless assumed, without discussion, that the easement specified in the deed to Hoblyn was binding on Mueller. Perhaps the court concluded that the provision in the original deed giv-

predecessors assumed that the described easement corresponded to a dirt road that the original dominant owner had used for access. When snow drifts made access to the described easement difficult, Hoblyn had the land surveyed, and discovered that the dirt road did not correspond to the described easement. When Mueller refused to give Hoblyn access to the described easement, Hoblyn sought to quiet title to the easement, and Mueller, who had drilled a water well within the easement boundaries, contended that the easement had been terminated by adverse possession, by abandonment, and by estoppel. The Wyoming Supreme Court rejected all three contentions. In rejecting the estoppel claim, the court emphasized the absence of evidence that Hoblyn had ever expressed permission for Mueller to take actions inconsistent with the continued existence of the easement.⁸⁶

Moreover, in those cases where the dominant owner has expressed an intention to relinquish rights to an easement, the estoppel doctrine is essentially irrelevant, because the servient owner has another doctrinal avenue for terminating the easement: abandonment. Courts have long held that abandonment terminates an easement, even without a writing. If a servient owner can establish that a dominant owner has abandoned an easement, it is unnecessary to show that the servient owner has relied on the dominant owner's action; non-use and intent to abandon is enough.⁸⁷

The result, then, is that if the dominant owner stops using an easement without any understanding that she is relinquishing rights to the easement, the lack of an understanding between the parties precludes termination by estoppel even if the servient owner has made significant expenditures. By contrast, if the dominant owner stops using the easement with an understanding that she is relinquishing rights, reliance is unnecessary because a court can hold that she abandoned the easement. Hence, there is little cause for courts to invoke the estoppel doctrine to terminate easements.

Sometimes, instead of the servient owner invoking the estoppel doctrine as a basis for terminating an easement, the dominant owner

ing the dominant owner power to fence the easement effectively gave the dominant owner the right to choose any location he wished, a right the dominant owner exercised not by using a dirt road, but by specifying the location in a deed to its successor.

86. See *id.* at 506.

87. See *Nahabedian v. Jarcho*, 510 A.2d 425, 429 (R.I. 1986) (distinguishing between termination by estoppel and termination by abandonment, while noting that both require "conduct on the part of the dominant owner evidencing an intent not to make further use of the easement," while only estoppel requires proof of reliance; court concludes that easement was terminated by abandonment). Of course, non-use alone does not establish abandonment without some further evidence of intent to abandon. See, e.g., *Sabino Town & Country Estates Ass'n v. Carr*, 920 P.2d 26 (Ariz. Ct. App. 1996) (rejecting abandonment claim and claim that abandonment estopped dominant owner from claiming easement).

invokes estoppel to prevent termination. The issue arises when the document creating the easement provides that the easement will terminate upon the occurrence of a specified condition. If the servient owner knows that the dominant owner is about to take action which would trigger termination of the easement, but does not warn the dominant owner that the action will terminate the easement, should the servient owner be estopped from contending that the easement was terminated once the dominant owner has acted?

An illustration of the problem is found in *Eis v. Meyer*.⁸⁸ In addition to a main entrance to their home, dominant owners had an easement to reach the back of their home across a roadway that bisected servient owner's parcel. The instrument creating the easement specified that the easement would terminate when the dominant owner built any new building, or enlarged any existing building. Dominant owners, in a chance conversation, informed the servient owner of their plans to construct an addition to their kitchen. The servient owner said nothing. When the dominant owners completed the addition, the servient owner sought termination of the easement. The dominant owners argued that the servient owner was estopped to seek termination. The Connecticut Supreme Court disagreed, holding that because the dominant and servient owners had equal access to knowledge about the terms of the easement, the dominant owners' "disregard of the conditions clearly expressed in a recorded document was not a natural consequence of the [servient owner's] silence."⁸⁹ That is, because the dominant owners did not know about the termination clause at all, and would have built the kitchen addition even if the dominant owners had never conversed with the servient owner, the dominant owners did not act in reliance on any representation made by the servient owner.⁹⁰

The court's conclusion in *Eis v. Meyer*, and in like cases, is consistent with the promise-based view of estoppel doctrine. In cases like *Eis*, it is clear that dominant owner acted in reliance on a mistaken belief that the easement would continue. Yet that reliance is not

88. 566 A.2d 422 (Conn. 1989).

89. *Id.* at 425.

90. See also *Maletis, Inc. v. Schmitt Forge, Inc.*, 870 P.2d 865, 868 (Or. Ct. App. 1994)(rejecting argument that the servient owner is estopped from invoking termination clause, court wrote: "Plaintiffs did not know about the termination clause. Therefore, they could not be misled by defendant's delay into believing that defendant would not exercise its rights under the clause."). But cf. *Erie-Haven, Inc. v. First Church of Christ*, 292 N.E.2d 837, 842 (Ind. Ct. App. 1973)(holding that trial court improperly granted summary judgment to the servient owner on dominant owner's claim that the servient owner was estopped from seeking termination; concluding that "[e]quitable estoppel may arise from silence as well as from positive conduct. For silence to give rise to equitable estoppel, there must not only be an opportunity to speak, but an imperative duty to do so.").

enough to invoke estoppel doctrine in the absence of a representation by servient owner that dominant owner's improvements would not trigger termination. Instead, courts assume that the servient owner acted based on a mistaken view of the writing, and that alone, in the absence of a promise by the servient owner, is insufficient to estop the servient owner from terminating the easement.⁹¹

V. BOUNDARY DISPUTES

When neighbors discover that the boundaries they have recognized on the ground do not correspond to the boundaries described in their deeds, the landowner who has been occupying more land than her deed describes may invoke the estoppel doctrine to prevent her neighbor from insisting on the record boundaries. Estoppel, however, is not the only weapon in the landowner's arsenal. She might also claim title by adverse possession, or invoke the doctrine of "acquiescence," or the doctrine of "agreed boundaries," as a basis for conforming record title to the apparent boundary as it appears on the ground. Often, many of these doctrines are invoked together in the same case. As a result, the importance of the estoppel doctrine varies, in large measure, with the content of the jurisdiction's law of adverse possession, acquiescence, and agreed boundaries. If, for instance, a landowner cannot invoke the acquiescence doctrine until the statute of limitations has passed, estoppel may be more important than if acquiescence is easier to establish.

Moreover, although estoppel is most often invoked against the record owner, there are occasions on which the record owner seeks to estop a neighbor from claiming title to a disputed boundary strip by adverse possession, or by a related doctrine. These two uses of estoppel merit separate analysis.

A. Estoppel Against a True Owner

1. *By the True Owner's Representations*

Suppose one landowner asks his neighbor about the location of the boundary between the two parcels. The neighbor indicates that the boundary is within a foot or two of a row of trees, and confirms the same boundary line on subsequent occasions. The landowner then makes substantial improvements on "his" side of the row of trees, only

91. Judicial treatment of this problem resembles treatment of the dominant owner who mistakenly improves an easement over a route different from that specified in the writing creating the easement. In the absence of an express representation by the servient owner that the dominant owner is entitled to use the wrong route, courts assume that the dominant owner acted on a mistaken reading of the easement, and that the estoppel doctrine should not, therefore, be available. See *supra* text accompanying notes 59-63.

to learn that the improvements lie on the neighbor's land. Adverse possession will not help the landowner unless the neighbor fails to object for the statutory period. Courts, however, typically hold that the neighbor's representations, together with landowner's reliance on those representations, estop the neighbor from insisting on the record boundary.⁹²

Estoppel doctrine operates against a record owner who represents that a particular line is in fact the boundary, and also against a record owner who represents that he will treat a particular line as the boundary, regardless of the boundary's actual location. In *Burkey v. Baker*,⁹³ the record owner told his future neighbor that the boundary line was within a foot of a line of trees—a representation about the actual boundary. In contrast in *Grunden v. Hurley*,⁹⁴ the record owner told his neighbor "[w]e'll move this fence over so you'll have some room in that yard"—a representation made without regard to the actual boundary.⁹⁵ In each case, the court held that the record owner's representation estopped him from insisting on the record boundary when his neighbor relied on that representation.

Of course, if the court is not convinced that the record owner has made a representation about the mutual boundary, it will be much more difficult for a neighbor to prevail on an estoppel claim.⁹⁶ Moreover, if the trial court has found that the record owner made no representation, an appellate court is not likely to overturn that determination.⁹⁷

A representation will not estop the record owner from claiming record boundaries unless the neighbor can show reliance on the representation.⁹⁸ The clearest case of reliance occurs when the record owner asks a neighbor to expend money on the disputed land, the neighbor

92. See *Grunden v. Hurley*, 736 P.2d 548 (Okla. Ct. App. 1987); *Douglass v. Rowland*, 540 S.W.2d 252 (Tenn. Ct. App. 1976); *Burkey v. Baker*, 492 P.2d 563 (Wash. Ct. App. 1971); cf. *Halverson v. Village of Deerwood*, 322 N.W.2d 761 (Minn. 1982)(involving representation by village mayor).

93. 492 P.2d 563 (Wash. Ct. App. 1971).

94. 736 P.2d 548 (Okla. Ct. App. 1987).

95. *Id.* at 548-49.

96. See, e.g., *Milliken v. Buswell*, 313 A.2d 111 (Me. 1973)(involving record owner that agreed to help neighbor move building, in part to preserve view of record owner's neighboring commercial building from highway; when record owner helped move building, and new location sits on boundary between the two parcels, court found record owner is not estopped because the parties had not discussed boundary lines). See discussion section V.B *infra*.

97. See, e.g., *Nelson v. Wagner*, 700 P.2d 973 (Idaho Ct. App. 1985)(declining to overturn trial finding that, although record owner made false representation about boundary, record owner had also told purchaser and future neighbor that he intended to sell property only by legal description).

98. See, e.g., *Brewer v. Lawson*, 569 S.W.2d 856, 858 (Tenn. Ct. App. 1978)(finding no estoppel where possessor knew record-owner's assertion was false and took no actions based on the false assertion).

does so, and the record owner then seeks to eject the neighbor from that land. For example, in *Douglass v. Rowland*,⁹⁹ the record owner, concerned that his neighbor's improvements were creating drainage problems, had his lawyer send his neighbor a letter requesting neighbor to build a concrete retaining wall. Record owner sent neighbor a survey, and indicated where the retaining wall should be built. Neighbor complied, but six months later, record owner, having commissioned a new survey, sought to eject neighbor from the land on which the retaining wall had been built. The court held record owner estopped from asserting a new boundary, observing that "the only reason in the world" that the record owner sent the survey to the neighbor was to induce the neighbor to build the retaining wall.¹⁰⁰ Similarly, neighbor had no reason to build the wall other than to satisfy his neighbor's concerns.

Of course, a neighbor can show reliance even if the record owner has made no express request for the neighbor to take action. In particular, courts are willing to assume reliance when the neighbor makes substantial improvements on land that lies within the boundaries described by the record owner.¹⁰¹ The record owner's representation is a but-for cause of the improvement; no landowner would readily make improvements on a neighbor's land without some assurance that she would recoup the value of the improvement. By contrast, when the improvements are not on the disputed property, courts find no evidence of detrimental reliance; the improvements might have been made regardless of any representations.¹⁰²

Finally, even if a record owner would otherwise be estopped by his representations, and by the ensuing reliance, courts are reluctant to permit a record owner's representations to estop a successor-in-interest.¹⁰³ The reluctance, however, is not absolute. If a successor-in-interest has notice of the earlier statements, estoppel may operate against successors.¹⁰⁴

99. 540 S.W.2d 252 (Tenn. Ct. App. 1976).

100. *See id.* at 255.

101. *See Grunden v. Hurley*, 736 P.2d 548 (Okla. Ct. App. 1987) (including driveway, swing sets, garden); *Burkey v. Baker*, 492 P.2d 563 (Wash. Ct. App. 1971) (including wooden bulkhead, boat ramp, boat hoist, tent platform).

102. *See Evans v. Forte*, 510 So. 2d 327 (Fla. Dist. Ct. App. 1987).

103. *See Madsen v. Holmes*, 203 N.W.2d 865, 869 (Wis. 1973) (holding that successors not bound by knowledge and representations of their grantor, at least unless they knew, at the time of purchase, the facts which would operate to bar their claim).

104. *See, e.g., Grunden v. Hurley*, 736 P.2d 548 (Okla. Ct. App. 1987) (holding current record owner bound by statements made by record owner's grandfather).

2. *By Physical Barriers and Improvements Without Representations*

What if the record owner makes no explicit representation that a fence or other physical marker is the boundary between parcels? His neighbor, assuming that the physical boundary is in fact the boundary, makes improvements up to the physical barrier—improvements that encroach on the record owner's land. Is the record owner estopped to dispute the physical barrier as the boundary? Two situations recur. In the first, the neighbor makes improvements after the record owner has expressly informed the neighbor that improvements would encroach, but the neighbor improves anyway. In that situation, courts uniformly hold that the record owner is not estopped to assert title to the record boundary. In this situation, the improving neighbor has not acted in reliance on any representation by the record owner, because the only representation made by the record owner is no more reassuring than "proceed at your own risk."¹⁰⁵

In *Smithers v. Hagerman*,¹⁰⁶ record owner "eyeballed" the boundary and built a fence that did not enclose all of the record owner's land. Later, neighbor surveyed the land, and discovered that neighbor's own land did not run up to the fence.¹⁰⁷ Neighbor asked the record owner to sign a boundary agreement which would provide that neighbor's land ran up to the fence. Record owner refused to sign the agreement. When neighbor's tenant started building a garage which encroached on record owner's land, record owner immediately notified tenant of the encroachment, and tenant, in turn, notified neighbor. Tenant nevertheless completed a garage, and neighbor later built a septic system, which also encroached on record owner's land. Record owner brought an action demanding that neighbor remove the encroachments. In rejecting neighbor's estoppel claim, the Montana Supreme Court emphasized that neighbor had failed to establish any facts which would show misrepresentation or concealment by record owner.¹⁰⁸ Moreover, in light of record owner's refusal to agree to ad-

105. Cf. DeLong, *supra* note 4, at 1007-08 (clarifying that explicit disclaimers of promissory liability are generally given effect).

106. 797 P.2d 177 (Mont. 1990).

107. *Id.* at 179.

108. See also *Herrmann v. Woodell*, 693 P.2d 1118, 1124 (Idaho Ct. App. 1985) (rejecting estoppel claim where neighbor met with record owner to try to purchase easement through disputed property and record owner refused); *Grant v. Warren Bros. Co.*, 405 A.2d 213, 217 (Me. 1979) (finding no estoppel to claim to record boundary where record owner says to neighbor "You say the line's up there and I say that's not right"); *Steel Creek Dev. Corp. v. Smith*, 268 S.E.2d 205, 211 (N.C. 1980) (finding no estoppel to claim of record boundary when neighbor builds and informed record owner where he planned to build a boathouse, and record owner said "[y]ou're going to have to cut this thing in two right here"); *Kronawetter v. Tamoshan, Inc.*, 545 P.2d 1230 (Wash. Ct. App. 1976) (rejecting estoppel claim when improver built bulkhead after record owner's surveyor informed him that

just the boundaries, none of neighbor's expenditures were in reliance on any action by record owner.

In cases like *Smithers*, the improving neighbor makes expenditures knowing that the record owner claims title to the disputed boundary area. In a second situation, the neighbor invokes estoppel when the record owner has taken no steps to indicate that she questions the fence, or other physical boundary, as the dividing line between the two parcels. Sometimes, neighbors invoke estoppel even without making any expenditures in supposed reliance on the physical boundary. Courts routinely reject these estoppel claims.¹⁰⁹ Long-term acceptance of a well-marked boundary may displace the record boundary by "acquiescence,"¹¹⁰ but in the absence of improvements, estoppel claims inevitably fail.

Where a physical boundary appears to divide two parcels, and one of the neighbors makes improvements in reliance on the belief that the physical boundary is the correct one, an estoppel claim would appear to have more appeal. One might conclude that the record owner, by not objecting to the improvements, has made an implied representation that the physical boundary is correct. Norms of neighborly behavior might require the record owner to warn a neighbor before the neighbor makes expenditures in the belief that the physical boundary is the correct one. Nevertheless, courts are generally hostile to estoppel claims when the record owner has made no express representations about the boundary line. Sometimes, the hostility reflects judicial recognition that the particular landowner could have made no timely objection because the landowner lived out of town and would

improvements were on disputed strip); *Miller v. Stovall*, 717 P.2d 798, 807 (Wyo. 1986), *overruled by* *Ferguson Ranch Inc. v. Murray*, 811 P.2d 287 (Wyo. 1991)(rejecting estoppel claim where record owner twice tore down fence neighbor tried to erect between parcels; court concluded that actions showed that record owner "openly disputed [neighbor's] contention as to the boundary").

109. See *Sceirine v. Densmore*, 479 P.2d 779 (Nev. 1971)(finding no estoppel because record owner's neighbor did not adversely change position); *Rautenberg v. Munis*, 226 A.2d 770 (N.H. 1967)(involving parties who did not use the parcel, which was swampy in nature); *Dodds v. Lagan*, 595 P.2d 452 (Okla. Ct. App. 1979)(finding that mere fact that adjoining owners have treated a line as the boundary does not estop them from claiming the true line).

110. Acquiescence is not always available to settle boundaries merely because a physical boundary has been marked for a long period of time. In a number of jurisdictions, acquiescence requires that the boundary be settled for a period as long as the statute of limitations. See, e.g., *Rautenberg*, 226 A.2d at 772 (requiring 20 years). In other jurisdictions, acquiescence is only available if the party claiming title to the marked boundary can show that the boundary was intended to resolve a dispute between the parties. See, e.g., *Sceirine*, 479 P.2d at 781 ("No evidence was shown from which we can imply that a dispute as to the boundary location existed.").

have been unaware of any encroaching improvements.¹¹¹ At other times, however, the hostility appears to be premised on a norm that a landowner acts at his own peril if he makes improvements without checking with his neighbor or conducting a survey.¹¹² The underlying principle appears to be this: because of the inherent difficulty of matching record boundaries with physical ones, the record owner should not be presumed to know precisely where his boundary is, nor should he be required to bear the expense of checking merely because his neighbor has started to make improvements near the apparent boundary. Hence, the record owner's silence in the face of improvements should not be treated as an implied representation about the location of the boundary (or as a breach of the record owner's duty to warn the neighbor), but rather as a manifestation of the record owner's ignorance about the boundary's precise location. And in the absence of a representation, the record owner should not be estopped from later insisting on record boundaries.

The judicial focus in boundary dispute cases on the actions taken by the record owner which might lead the neighbor to make expenditures on the record owner's land, not on the expenditures themselves, is consistent with a tort-based "duty to warn" approach to estoppel. If the record owner has little reason to know that his neighbor is putting himself in jeopardy, the record owner has no duty to warn the neighbor about his predicament.

B. Estoppel to Claim Adverse Possession

When a neighbor has occupied a record owner's land for long enough to establish title by adverse possession, the record owner occasionally contends that the neighbor's statements or actions should estop the neighbor from claiming title by adverse possession. If the neighbor makes statements acknowledging the record owner's title before the adverse possession period has expired, the record owner has no need to invoke the estoppel doctrine, because the neighbor's actions are inconsistent with the "hostility" or "claim of title" necessary to establish title by adverse possession.¹¹³ When, however, the neighbor

111. See *Hadlock v. Poutre*, 423 A.2d 835, 837 (Vt. 1980)(noting that record owners "lived out-of-state and did not know that the defendants were building a barn. A party is not estopped by science unless he knows of his rights.").

112. See *Brown v. Clemens*, 338 S.E.2d 338 (S.C. 1985)(improving neighbor had means of knowledge to determine boundary location before building encroachments); *Buza v. Wojtalewicz*, 180 N.W.2d 556, 561 (Wis. 1970)(finding that improving landowner "had an affirmative duty to locate his true boundaries and stay within them").

113. See, e.g., *Dillaha v. Temple*, 590 S.W.2d 331 (Ark. Ct. App. 1979); *Van Gorder v. Masterplanned, Inc.*, 585 N.E.2d 375 (N.Y. 1991). Note that in cases like these, the record owner might well rely on the neighbor's statements by failing to bring an ejectment action against the possessor. Hence, if the hostility or claim of right

makes statements after expiration of the adverse possession period, estoppel claims typically fail because the record owner can show no reliance on the statements.

For example, in *Kline v. Kramer*,¹¹⁴ twenty-five years after a fence was constructed on what appeared to be the common boundary, neighbor allegedly indicated to the record owners the surveyor's stakes which indicated the true boundary line between the parcels. Record owners contended that neighbor's statements should estop neighbor from claiming title by adverse possession, even though the statements were made long after the ten-year adverse possession period had expired. The court rejected record owners' argument, noting that record owners had not revealed the manner in which they had relied on neighbor's acknowledgment of the surveyor stakes.¹¹⁵

Finally, even if estoppel claims might succeed against the possessor who has made the initial representation to the record owner, courts have been unwilling to hold that estoppel claims bind successors-in-interest without notice of the representation. Thus, where an ancient fence appears to separate two parcels, the purchaser of the encroaching parcel is not bound by his seller's representation that the seller will abide by the record boundary.¹¹⁶

requirements were not enough to defeat the neighbor's adverse possession claim, the record owner might be able to invoke estoppel against the neighbor.

Of course, if the court concludes that the neighbor made no representations to the record owner, then courts are likely to find the requisite hostility to establish title by adverse possession, and the absence of any representation will preclude any estoppel claim by the record owner. For example, in *Meier v. Rieger*, 954 P.2d 786 (Or. Ct. App. 1998), *review denied*, 966 P.2d 222 (Or. 1998), the record owners told the adverse possessor that boundary lines on both sides of her property were incorrect. The adverse possessor moved the fence to enclose additional property on one side, but retained existing fence—which encroached on the record owner's land—on the other side. The court rejected the record owner's argument that the adverse possessor's actions amounted to a representation that she would accede to record boundaries; it found that the adverse possessor had established hostile possession, and that the adverse possessor was not estopped to assert an adverse possession claim. *See id.* at 791.

114. 386 N.E.2d 987 (Ind. Ct. App. 1979).

115. *See id.* at 487. In addition, in *Evans v. Wittorff*, 869 S.W.2d 872 (Mo. Ct. App. 1994), after the adverse possession period had expired, the neighbor allegedly told the record owner that if she surveyed the property, he would recognize the survey line. The record owner did nothing for five years, but later surveyed the property and discovered that the existing fence enclosed 43 acres of "her" land. The court rejected the record owner's estoppel argument, holding that estoppel would not run against the original neighbor's successor, who had purchased without notice, after the neighbor had made his original representation. The court also held, however, that any reliance was unreasonable since it did not occur until five years after the neighbor made his representation. Moreover, the court did not indicate what reliance the record owner had established—other than simply commissioning the survey. *See id.* at 875-76.

116. *See Evans v. Wittorff*, 869 S.W.2d 872 (Mo. Ct. App. 1979).

VI. LANDLORD-TENANT LAW

When a landlord and tenant agree to lease premises for longer than a year, the statute of frauds generally requires that the lease be in writing.¹¹⁷ Nevertheless, even when the parties have a written lease, the ongoing nature of the landlord-tenant relationship naturally leads to oral exchanges between the parties. In a variety of circumstances, these exchanges lead to estoppel claims by one party against another. This section examines the judicial reaction to a number of those claims.

A. Lease Renewal

Lease agreements often give a tenant an option to renew for one or more additional periods upon expiration of the original lease, or an option to purchase at some point during the lease. Typically, the agreement provides a formal mechanism for a tenant to follow in exercising the renewal option. If, however, landlord makes statements which lead tenant to believe that tenant need not take the steps enumerated in the lease agreement, landlord may face an estoppel claim by tenant. Courts are generally receptive to these estoppel claims.¹¹⁸

Other leases include no option to renew. Nevertheless, a tenant may contend that landlord has made a statement which led tenant to believe that the lease had been renewed. In this situation, too, a tenant sometimes advances an estoppel claim. These estoppel claims tend not to be successful.

1. Leases Which Include Option to Renew or Purchase

When a lease gives a tenant an option to renew at a stated price, or an option to purchase at a stated price, the option represents a significant portion of the consideration for the lease. If that option turns out to be valuable, and if tenant does not exercise the option in accordance with the terms of the lease, courts are receptive to the argument that landlord made statements or took actions that induced tenant not to

117. See RESTATEMENT (SECOND) OF CONTRACTS § 125(4) cmt. b (1981)(indicating that in most states oral leases are valid only if for a term not longer than one year).

118. Sometimes it is the landlord who invokes estoppel to bind the tenant to a renewal term. For instance, in *HLM Realty Corporation v. Morreale*, 477 N.E.2d 394 (Mass. 1985), the lease gave the tenant an option to renew at a rent to be determined in arbitration. The tenant timely exercised its renewal option, and then vacated the premises before the renewal term began and before arbitration commenced. The Supreme Judicial Court held that the lessee was not bound to pay rent for the renewal term. The court held that neither party became obligated to a renewal lease by the terms of the original agreement until the arbitration process was completed. The court then held that the tenant was not estopped from denying the renewal because the tenant had taken no steps to induce the landlord not to proceed with arbitration, nor had the landlord failed to proceed as a consequence of the tenant's departure from the premises. See *id.* at 395-96.

exercise, and that those statements or actions caused tenant's failure to exercise.

To take the most obvious case, if landlord explicitly (but orally) assures tenant that he need not exercise the option by its expiration date, courts typically hold landlord estopped from refusing to renew when tenant does not exercise on time.¹¹⁹ Even if landlord makes no explicit representation, however, some courts have held landlord estopped from refusing a lease renewal if landlord knew tenant intended to renew and took no steps to assure that tenant took the formal actions necessary to renew.¹²⁰

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119. See *Goldstein v. Hanna*, 635 P.2d 290 (Nev. 1981)(holding that landlord was estopped from asserting that tenant's option to purchase had expired when landlord's agent assured tenant that option would continue in effect for several months); *CVG Shops, Inc. v. Fifth Third Center Assocs.*, No. C-960091, 1996 WL 691449 (Ohio Ct. App. Dec. 4, 1996)(finding that landlord was estopped from refusing to renew at market rate where lease provided for renewal at a rate to be negotiated, but not to exceed then current market rate; during renewal negotiations, landlord's agent orally extended deadline for notification until negotiations were completed); *New Empire Corp. v. Davidson*, No. 80-1155, 1981 WL 138721 (Wis. Ct. App. Apr. 27, 1981)(holding that landlord was estopped from denying lease renewal where lease included option to renew for five years, parties orally agreed to two-year extension, and landlord's agent assured tenant that there was no need to sign the lease until tenant returned from Florida at the end of the winter).
120. See *Herbst v. Santa Monica Swim & Health Club, Inc.*, 238 Cal. Rptr. 790 (Ct. App. 1987)(holding landlord estopped to enforce written notice provision when landlord knew of major expenditures made by tenant within three years of renewal date, and when landlord accepted tenant's tax payment for a period extending beyond expiration of original lease and lease required 90-day written notice of intent to renew)(review denied, not published in official reporter and cannot be cited in California); *Wachovia Bank & Trust Co. v. Rubish*, 293 S.E.2d 749 (N.C. 1982)(holding landlord, and landlord's estate, estopped from insisting on written notice by implicit representation that oral notice would be adequate where landlord permitted tenant to exercise option orally in the past). *But see Carsten v. Eickhoff*, 323 N.E.2d 664 (Ind. Ct. App. 1975) (holding that landlord was not estopped to deny renewal even though tenant had expended \$750,000 for a stone crushing and processing plant to process stone from leased premises; court held that landlord had no duty to speak when tenant did not promptly renew, and also noted that landlord did not know that plant could not be operated feasibly without use of the leased premises).

Of course, if there is insufficient evidence that the tenant intended to exercise the option to renew, the landlord will not be estopped to deny renewal. Thus, in *Vuci v. Nathans*, 357 So. 2d 561 (La. Ct. App. 1978), a tenant took a one year lease at an annual rental of \$300, with an option to renew for an additional four-year term at a rental of \$500. The tenant did not exercise the option, but continued in possession at the end of the year, and paid the landlord rent of \$300. The court concluded that the tenant's behavior was consistent with an intent to create a month-to-month lease rather than exercise the option to renew. See *id.* at 563; see also *In re Joyner Oil Co.*, 74 B.R. 618 (Bankr. M.D. Ga. 1987)(finding that landlord was not estopped to deny renewal where bankrupt debtor failed to exercise option to renew, and landlord had no notice of tenant's supposed intent to renew); *Sentara Enters. v. CCP Assocs.*, 413 S.E.2d 595 (Va. 1992)(holding land-

Sometimes, the landlord alleges not that tenant's exercise of the renewal option was untimely, but that a person without authority purported to exercise the option. Here, too, if landlord takes action that leads tenant (or tenant's assigns or agents) to believe that exercise is proper, courts hold landlord estopped to deny renewal.¹²¹

Although courts are quick to invoke estoppel to protect tenants who have failed to exercise renewal options on time, courts might protect tenants threatened with loss of renewal rights even if landlord played no role in tenant's failure to renew. Some courts, for instance, have held forthrightly that a tenant's failure to exercise renewal rights on time—even if the failure results from the tenant's own inattention or carelessness—should be excused if landlord is not prejudiced by tenant's delay.¹²² These courts invoke principles like "equity abhors a forfeiture" to protect tenant renewal rights.¹²³ When courts strain to attribute tenant delay to representations made by a landlord, they may be accomplishing covertly the same objectives realized by other courts more directly. Hence, one might suspect that the estoppel label in this class of cases has little to do with a landlord's representations. Instead, when courts invoke estoppel, they appear to be holding that landlord and tenant are enmeshed in a relationship that obligates landlord to warn tenant of the potential loss of a valuable renewal option. As is generally the case with the duty to warn, there is far from universal agreement about the existence or scope of that obligation.

2. *Leases Which Do Not Include Renewal Options*

Even when a lease includes no renewal option, a tenant and landlord may have oral discussions about extending or renewing the lease at the expiration of the term. When the lease includes a renewal op-

lord not estopped to deny renewal when tenant forgot to send renewal notice and where tenant had not made improvements or taken other steps to put landlord on notice of an intent to renew).

121. See *Billman v. V.I. Equities Corp.*, 743 F.2d 1021, 1024 (3rd Cir. 1984)(holding landlord waived right to object to exercise; court concluded that the genre of waiver is "akin to promissory estoppel"); *Zeese v. Estate of Siegel*, 534 P.2d 85 (Utah 1975) (holding landlord who, by action, indicated acceptance of notice as an effective exercise is estopped from objecting to exercise).
122. See, e.g., *Aickin v. Ocean View Invs. Co.*, 935 P.2d 992 (Haw. 1997); *J.N.A. Realty v. Cross Bay Chelsea, Inc.*, 366 N.E.2d 1313, 1316 (N.Y. 1977)(permitting tenant to renew lease even though tenant, as a result of its own carelessness, missed the deadline for exercising the renewal option).
123. See *J.N.A. Realty v. Cross Bay Chelsea, Inc.*, 366 N.E.2d at 1316 ("an equitable interest is recognized and protected against forfeiture in some cases where the tenant has in good faith made improvements of a substantial character, intending to renew the lease, if the landlord is not harmed by the delay in the giving of the notice and the lessee would sustain substantial loss in case the lease were not renewed").

tion, the option generally specifies the terms of the renewal lease; when the lease includes no option, renewal frequently involves adjustments to various terms, including, but not limited to, the rent term. If discussions between a landlord and tenant lead to an executed renewal lease, no statute of frauds or estoppel problems generally arise. Suppose, however, renewal discussions do not generate an executed lease. A disappointed tenant may claim that landlord orally represented that the lease would be renewed, and that landlord's representation should estop landlord from refusing to renew.

These estoppel claims are rarely successful. Tenant's most immediate problem is establishing the content of landlord's representation. If the representation is oral, how can a court know what the new rent should be, or the terms of the new lease? Rarely does a tenant's supposed reliance on landlord's representations clarify the terms of the supposed agreement. For instance, when tenant has made improvements on the leased property after landlord's representation, it is often unclear what the useful life of the improvements might be or whether tenant might have made the improvements even if the new lease included a significant rent increase.¹²⁴ Similarly, if landlord orally promises to renew the lease if tenant takes actions helpful to landlord, tenant's reliance—by taking those actions—does not establish the terms of the promised renewal.¹²⁵ Moreover, if tenant alleges that she relied by staying in the premises beyond the original lease term, the tenant's action of remaining on the premises is entirely consistent with a holdover arrangement rather than a new lease term.¹²⁶ In cases like these, the actions taken by tenant might well have been taken without any lease renewal at all, and certainly without a renewal on the terms tenant alleges landlord promised. Hence, tenant's actions provide little corroboration of the supposed agreement.

Indeed, even when a tenant's reliance is clear, courts have been hesitant to invoke estoppel when the content of landlord's promise is unclear. *Peter E. Blum & Company v. First Bank Building Corpora-*

124. See *Cohen v. Brown, Harris, Stevens, Inc.*, 475 N.E.2d 116, 117 (N.Y. 1984)(rejecting estoppel claim despite tenants' allegation that they made thousands of dollars in improvements to rented maids' rooms based on alleged promise that tenants could continue renting the rooms for "so long as they desire and need to do so"; tenants certainly might have made improvements without assurance of perpetual lease, so the improvements themselves did not provide corroboration for any particular lease term, nor any particular rent).

125. See *Tribune Printing Co. v. 263 Ninth Ave. Realty, Inc.*, 444 N.E.2d 35 (N.Y. 1982)(holding estoppel claim failed when landlord allegedly promised to renew tenant's lease if tenant wrote helpful letter to Industrial Development Agency in support of landlord's application).

126. See *Dixieland Food Stores, Inc. v. Gedder*, 505 So. 2d 371 (Ala. 1987)(holding that continuing to pay rent provided for under old lease did not demonstrate reliance on validity of new lease tenant himself had failed to execute).

tion¹²⁷ is illustrative. With about a year remaining on his existing lease, tenant received an offer from a neighboring tenant to take over that tenant's space. Tenant then asked lessor whether his lease would be renewed at expiration, and enclosed correspondence from the neighboring tenant. Tenant alleged that landlord's representative had confirmed that the lease would be renewed, and landlord's vice president wrote tenant a letter indicating that he was "glad . . . [tenant was] . . . looking forward to remaining for many years to come."¹²⁸ Tenant then discontinued negotiations with neighbor, and landlord later informed tenant that it would not renew the lease, but would offer another space at double the rent. In affirming the trial court's grant of summary judgment to landlord, the court held that landlord's letter was itself insufficient to estop landlord, and that landlord had no duty to deny statements made by tenant with respect to the alleged promise to renew.

By contrast, where a writing itself corroborates tenant's allegations of a promise to renew, courts may be more receptive to an estoppel claim. In *Daehler v. Oggoian*,¹²⁹ the court held that the trial court had improperly stricken tenant's estoppel claim where tenant produced an unsigned lease with a prior landlord, tenant testified that his prior landlord had assured him that he had a new lease, and where successor landlord testified that he saw the tenant moving heavy machinery into the premises shortly before successor purchased the building, and shortly before expiration of the lease. In *Daehler*, the writing, together with tenant's actions, corroborated not only tenant's claim that prior landlord had made an enforceable promise to renew, but also the terms of the renewal lease.

B. Estoppel by Acceptance of Rent

When landlord accepts rent from tenant without taking steps to enforce a lease provision the tenant has previously breached, tenant may argue that the acceptance estops landlord from enforcing the lease provision. These cases do not fall into the typical estoppel pattern. If tenant's violation of a lease occurs *before* landlord accepts rent, tenant cannot argue that landlord's acceptance induced tenant to violate the lease's terms. At best, tenant might argue that by accepting rent checks, landlord implicitly waived his right to enforce the lease provision (a claim tenant often appends to the estoppel claim).¹³⁰ For tenant's estoppel claim to succeed, tenant would have to establish that she took some action *after* landlord's acceptance of

127. 275 S.E.2d 751 (Ga. Ct. App. 1980).

128. *Id.* at 753.

129. 390 N.E.2d 417 (Ill. App. Ct. 1979).

130. Often, however, the lease explicitly prohibits oral waiver of the terms of the lease, making waiver claims unattractive to tenant.

rent in reliance on the assumption that landlord had waived any right to take action against the lease violation. For many tenants, this is an insurmountable burden.

Consider first cases in which a landlord seeks to recover possession because tenant's use of the premises is inconsistent with the terms of the lease, or with an applicable zoning ordinance. After learning of tenant's use, landlord continues to accept rent. What act can tenant allege that she has taken in reliance on landlord's acceptance? The only plausible act is that she persisted in the prohibited use, confident that landlord had waived any right to take action. On occasion, courts uphold a tenant's estoppel claim in this situation—holding that before seeking possession, landlord must make it clear to the tenant that the prohibited use will not be tolerated, and must give tenant an opportunity to cure.¹³¹ If, however, the landlord has made clear and persistent objections to tenant's use, acceptance of rent will not estop landlord from recovering possession.¹³² In these cases, landlord's acceptance of rent would not lull tenant into believing that landlord had waived the right to enforce the lease provision; hence, any expenditures tenant subsequently made would not have been in reliance on any implied representation by the landlord.

Next, consider the cases in which tenant has tendered, and landlord has accepted, rent checks in an amount which, according to landlord, is less than the total rent due under the lease. So long as landlord has consistently informed tenant that the rent tendered was not the amount due, acceptance does not generally estop landlord from seeking the balance. First, so long as landlord provides tenant with notice of its position, tenant cannot claim that landlord's action induced any particular behavior on her behalf.¹³³ Second, even if a ten-

131. For example, in *Entrepreneur, Ltd. v. Yasuna*, 498 A.2d 1151 (D.C. 1985), a tenant failed to obtain a certificate of occupancy for business use of the premises. The court held that the landlord was estopped to invoke "unlawful purpose" covenant in the lease when both parties had contemplated business use of the premises, and where the landlord had accepted rent knowing of the tenant's use. See *id.* at 1159-60. The court wrote: "Once the landlord has, by his conduct, in effect acquiesced in the breach of the lease covenant, he may stand on his legal right to enforce the covenant only if he gives notice of his intent to the tenant and an opportunity to cure the default prior to declaring a forfeiture." *Id.* at 1162.

132. See *Lewis v. Clothes Shack, Inc.*, 309 N.Y.S.2d 513 (Civ. Ct. 1970) (finding that landlord was not estopped from enforcing restrictions on storefront design even after acceptance of rent; court noted that all of landlord's actions reflected an intent to enforce the lease provision); *Jordan v. Duprel*, 303 N.W.2d 796 (S.D. 1981) (holding that landlord was permitted to recover possession against tenant who had overgrazed land despite a lease provision prohibiting overgrazing and despite landlord's persistent request that tenant modify grazing practices; court rejected tenant's estoppel argument).

133. See *Stevens Hous. Co-op I v. Guiffre*, No. 40319-2-1, 1998 WL 129967 (Wash. Ct. App. Mar. 23, 1998) (rejecting estoppel claim when landlord's acceptances were accompanied by 3-day notices informing tenant of arrearage).

ant might erroneously believe that acceptance of rent signaled landlord's waiver of the right to collect more, it is difficult to imagine what reliance tenant might assert on landlord's implied representation: so long as tenant was bound under the lease to pay the higher rent, remaining on the premises would not constitute detrimental reliance, but would instead constitute performance of the tenant's leasehold obligation. The situation is different when the rent dispute arises at the time for renewal. When tenant has an option to renew, the lease does not generally require tenant to renew; if the terms are unsatisfactory, tenant may seek other premises. If tenant purports to renew the lease at a specified price—a price less than that specified in the renewal provisions of the original lease—landlord's acceptance of rent checks without any indication of an intent to adhere to the terms of the original lease might well induce reliance by tenant. For example, tenant might stay, rather than seek new premises, in reliance on landlord's implied representation that the tendered rent was adequate.

*Altman v. Alaska Truss & Manufacturing Company*¹³⁴ is illustrative. The initial sublease gave the subtenant an option to renew for an additional five years, and provided that the renewal rate would be established by arbitration unless the parties agreed on a rate within forty-five days after exercise of the option. The sublease also provided for an adjustment of rent if landlord raised prime tenant's rent during the period of the sublease. Subtenant wrote prime tenant to exercise the renewal option, and when the prime tenant did not seek arbitration, subtenant sent to prime tenant a document entitled "Renewal of Lease," which specified a new rent set unilaterally by subtenant. Prime tenant accepted rent checks at that amount for nearly a year before raising any objections to the rent. When, several years later, prime tenant brought an action to recover additional rent, the court affirmed the trial court's determination that the prime tenant was estopped from asserting any right to more rent than was paid by subtenant during the renewal period.¹³⁵

In a case like *Altman*, if landlord had immediately invoked the original lease's arbitration provision, or if landlord had asserted a right to collect fair market rent, tenant might have chosen to seek other premises. When landlord failed to object to tenant's proposal, and then accepted tenant's tender of rent, landlord made an implied representation on which tenant might well have relied.

134. 677 P.2d 1215 (Alaska 1983).

135. See *id.* at 1223.

C. Estoppel to Evict for Late Payment After Prior Acceptance of Late Rent Payments

When tenant frequently pays rent late, and landlord accepts those late payments, is landlord later estopped from bringing an action for possession based on tenant's late payment of rent? Some courts have suggested that if landlord's past acceptance of rent payments induces tenant to make subsequent late payments when tenant would otherwise have paid on time, landlord is estopped from using those subsequent late payments as a foundation for eviction.¹³⁶ Even these courts hold, however, that if tenant would have made the subsequent late payment in any event—for instance, because the tenant was abandoning its business—then tenant cannot assert landlord's prior acceptance as a basis for an estoppel defense.¹³⁷ Furthermore, if landlord, after accepting late payment of rent, provides tenant with notice that subsequent late payment will result in eviction, landlord dissipates any estoppel effect created by prior acceptance.¹³⁸ That is, landlord's duty is largely a duty to warn. And, as is the case in other areas of property, not all courts embrace landlord's duty to warn a breaching tenant. Some courts hold that landlord's prior acquiescence in tenant's late payments does not estop a landlord from evicting for delinquent payments.¹³⁹

VII. CONCLUSION

Courts confront estoppel claims in almost every area of property law. In each area, the standard lore is the same. One party is estopped to act in a way that is inconsistent with a representation or promise that party has made if, when she made the representation or promise, it was reasonably foreseeable that another party would rely on it, and the other party did rely on it to his detriment.¹⁴⁰ The stan-

136. See *Lafayette Car Wash, Inc. v. Boes*, 282 N.E.2d 837, 840 (Ind. 1972).

137. See *id.*

138. For example, in *A.P. Development Corporation v. Band*, 550 A.2d 1220 (N.J. 1988), the court held that a landlord was not entitled to evict a tenant for habitual late payment of rent when the landlord's acceptance of rent did not give clear notice that continued failure to pay rent promptly would lead to eviction. The court noted "[i]f the landlord's monthly late payment notices had clearly stated that the tenant's continued failure to pay rent promptly would lead to eviction, the landlord's position in this case would be upheld." *Id.* at 1231. Cf. *Riverside Dev. Co. v. Ritchie*, 650 P.2d 657 (Idaho 1982) (holding that once a landlord provides notice that late payment will lead to eviction, previous waiver does not prevent landlord from enforcing lease; court discussed waiver, not estoppel).

139. See *S.H.V.C., Inc. v. Roy*, 428 A.2d 806 (Conn. App. Ct. 1981).

140. Cf. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.10 (Tentative Draft No. 1, 1989) (endorsing similar formulation for creation of servitudes by estoppel).

dard doctrinal statement, however, obscures the different functions the estoppel doctrine plays in property law.¹⁴¹

First, in many cases, the doctrinal requirements substantiate an express, seriously intended promise or transfer of land. That is, courts invoke estoppel doctrine when the actions of the parties, taken in context, duplicate the assurances we normally attribute to the statute of frauds: a serious promise was made, and there is strong evidence about the terms of the promise. When these assurances are absent—when courts suspect that the promisor made only a casual statement, or that the parties reached only a preliminary agreement—invocation of the estoppel doctrine generally fails. When circumstances do provide strong evidence of a serious promise, however, courts typically enforce the promise as if it were a promise in writing.

The case law also reveals a second use of the estoppel doctrine. Even when the parties have made no promise at all, a number of courts hold that within the context of particular ongoing relationships, one party may have a duty to rescue the other from foreseeable harm caused by the other party's mistaken understanding of the parties' respective legal rights. Both the existence and the scope of this duty remain controversial in current doctrine, but within the relationship between neighbors, and between landlord and tenant, many courts are not willing to treat the parties as if they were strangers dealing with each other at arms' length, responsible only for obligations expressly undertaken.

141. As Robert Hillman has noted in a recent study of promissory estoppel in contract law, "[c]ommentators sometimes seem too zealous to find the 'key' element of one law or another and seem unwilling to admit how complex the law may be." Hillman, *supra* note 4, at 619.